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In the

Supreme Court of the United States

OCTOBER TERM, 1971

No. 1620

EARL EILERS, et al,

Petitioners,

v.

HERCULES, INC., et al,

Respondents.

PETITION FOR WRIT OF CERTIORARI

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No. .....

EARL EILERS, et al,

Petitioners,

v.

HERCULES, INC., et al,

Respondents.

PETITION FOR WRIT OF CERTIORARI

Petitioners, Earl Eilers, Peggy Patrick, individually and as administratrix of the Estate of Glenn Patrick, Deceased, and for and on behalf of the minors, Kenneth Glenn Patrick and Theresa Lynn Patrick, and American & Foreign Insurance Company, Intervenor, workmen's compensation insurance carrier for EasTex, Inc., pray that a writ of certiorari issue to review the decision and judgment in this cause of the Court of Civil Appeals for the Ninth Supreme Judicial District of Texas at Beaumont, Texas, made final by the refusal of the Supreme Court of Texas to grant Petitioners' application for writ of error and said Court's

overruling of Petitioners' motion for rehearing on its said refusal.

OPINION AND DECISIONS IN THE STATE APPELLATE COURTS

The opinion in this cause of the Court of Civil Appeals for the Ninth Judicial District of Texas at Beaumont, Texas, printed as Appendix C below, is reported at 458 S.W. 2d 221.

The decision in this cause of the Supreme Court of Texas to refuse Petitioners' application for writ of error, finding no reversible error, was made without opinion on January 13, 1971, is printed as Appendix D, below, and is reported in Volume 14, Texas Supreme Court Journal at page 164.

The decision in this cause of the Supreme Court of Texas, overruling Petitioners' motion for rehearing on their application for writ of error, was made without opinion on February 10, 1971, is printed as Appendix D, below, and is reported in Volume 14, Texas Supreme Court Journal at page 226.

JURISDICTION

The final decision of the Supreme Court of Texas in this case was rendered on February 10, 1971, making final the judgment of the intermediate State Court, the Court of Civil Appeals.

Jurisdiction of this Court is invoked under 28 U.S.C. § 1257(3).

In this case, Petitioners specifically set up and relied throughout on their rights under statutes of the United States, to wit:

The federal Safety Appliance Acts, §§ 1-16, as amended, March 2, 1893, c. 196, 27 Stat. 531, 532 (1893); April 1, 1896, c. 87, 29 Stat. 85 (1896); March 2, 1903, c. 976, 32 Stat. 943 (1903); April 14, 1910, c. 160, 36 Stat. 298, 299 (1910); June 25, 1948, c. 646, 62 Stat. 909 (1948); August 14, 1957, 71 Stat. 352 (1957); April 11, 1958, 72 Stat. 86 (1958); 45 U.S.C., § 1, *et seq.* (1954), as amended. (Transcript 20, 34 43-48)[1].

This suit alleging violation of the federal Safety Appliance Acts and the absolute liability thereunder of the Respondents, and each of them, jointly and severally, was instituted in the District Court, 1st Judicial District, Jasper County, Texas, by Petitioners, Earl Eilers, for personal injuries, and Peggy Patrick as administratrix of Glenn Patrick's estate, individually and for and on behalf of Kenneth Glenn Patrick and Theresa Lynn Patrick, for the death of Glenn Patrick, husband and father of these Petitioners (Tr. 20, 36). The American & Foreign Insurance Company, compensation insurance carrier for EasTex, intervened for workmen's compensation, medical and death benefits paid, and attorneys' fees (Tr. 43-48).

Following the presentation of the evidence, in response to the "special issue" charge submitted to them by the Trial Court, the jury found that the dome lid of the tank

[1] Citations are to portions of the Appellate Record in this cause, including the Transcript and Statement of Facts.

car in question was a safety appliance, that the dome lid had failed to operate properly to release the car's internal pressure, and that such failure was a proximate cause of this occurrence (Tr. 553).

Further, the jury found the explosion was not the result of an unavoidable accident (Tr. 593), and that no act or omission on the part of EasTex, its supervisors, foremen, or employees, either individually or in combination, was the sole cause of this explosion (Tr. 592). Finally, no negligence on the part of either Glenn Patrick or Earl Eilers was found by the jury to have proximately caused the explosion (Tr. 577-586).

In response to the damages issues submitted to them, the jury awarded $80,000.00 each to Peggy Patrick, Kenneth Glenn Patrick, and Theresa Lynn Patrick, $1,500.00 for necessary funeral and burial expenses for Glenn Patrick, and $42,000.00 to Earl Eilers — a total of $283,500.00 (Tr. 594-598).

Judgment, including 6% interest thereon until paid, was entered by the Trial Court for Petitioners, including the Intervenor, against all Respondents, jointly and severally, for absolute liability pursuant to the federal Safety Appliance Acts, 45 U.S.C., § 1, *et seq.* (Tr. 635-639).

The intermediate Texas Appellate Court, the Court of Civil Appeals in Beaumont, reversed and rendered judgment for Respondents, on the theory that as a matter of

law the dome lid of this tank car was not a safety appliance so as to invoke the remedial absolute liability of the federal Safety Appliance Acts, 45 U.S.C., § 1, *et seq.* (App. A).

Petitioners timely moved for a rehearing before the intermediate Court, then filed their application for writ of error with the Supreme Court of Texas, which application was refused, with the notation "no reversible error" (App. D). Petitioners' timely motion for rehearing before the Supreme Court of Texas was overruled (App. D), making final the decision and judgment of the intermediate Texas Appellate Court.

Petitioners submit that these decisions of the State Appellate Courts are not in accord with previous, applicable decisions of this Court and other Courts, presenting this Court with a "federal question" as to the scope and construction of the federal Safety Appliance Acts and whether the dome lid of railroad tank car UTLX 48028 is a "safety appliance" under such Acts.[2]

It is further submitted that the decisions of the State Appellate Courts have deprived Petitioners of their property in contravention of the due process provision of the 14th Amendment to the United States Constitution.

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[2] *St. Louis, I. M. & S. Ry. Co. v. Taylor*, 210 U.S. 281 (1908) at p. 293; *Moore v. Chesapeake & Ohio Ry. Co.*, 291 U.S. 205 (1934) at p. 214.

QUESTIONS PRESENTED FOR REVIEW

A. IS THE DOME LID ON THE RAILROAD TANK CAR IN QUESTION, NO. UTLX 48028, A SAFETY APPLIANCE WITHIN THE SAFETY APPLIANCE ACTS AS APPLIED, AND SUBJECT TO THE ABSOLUTE DUTIES AND LIABILITIES ARISING THEREUNDER, WHEN IT WAS THE ONLY APPLIANCE FOR THE RELEASE OF THE TANK CAR'S INTERNAL PRESSURE UNTIL IT BUILT UP HIGH ENOUGH TO ACTIVATE THE CAR'S SAFETY VALVES, SET AT 25 POUNDS PER SQUARE INCH?

B. DO THE RESTRICTIVE DECISIONS OF THE STATE APPELLATE COURTS IN THIS CASE CONFLICT WITH THE PREVIOUS LIBERAL APPLICATION AND CONSTRUCTION OF THE SAFETY APPLIANCE ACTS AND THEIR ABSOLUTE PROTECTIONS BY THIS COURT AND OTHER COURTS?

C. DO THE RESTRICTIVE DECISIONS OF THE STATE APPELLATE COURTS IN THIS CASE, REVERSING AND RENDERING PETITIONER'S TRIAL COURT JUDGMENT BASED ON RECOVERY PURSUANT TO THE SAFETY APPLIANCE ACTS, DEPRIVE PETITIONERS OF THEIR PROPERTY IN VIOLATION OF THE DUE PROCESS GUARANTY OF THE 14TH AMENDMENT TO THE UNITED STATES CONSTITUTION?

STATUTES INVOLVED

The federal Safety Appliance Acts, §§ 1-16, as amended, 45 U.S.C. § 1, *et seq.*[3], *cited* above, all of which are set forth in Appendix A, below.

STATEMENT OF THE CASE

Petitioners were the Plaintiffs and Intervenor, respectively, in the Trial Court. Respondents, Hercules, Inc., Atchison,

[3] Citations to the United States Code are to the 1954 edition thereof, as amended, unless otherwise indicated.

Topeka and Santa Fe Railway Company, and Union Tank Car Company, were the Defendants in the Trial Court.

In the interests of brevity and this Court's time, Respondent Hercules, Inc. will be referred to herein as "Hercules", Respondent Atchison, Topeka and Santa Fe Railway Company as "Santa Fe", and Respondent Union Tank Car Company as "Union Tank". EasTex, Inc. will be referred to as "EasTex".

On the morning of October 17, 1967, at the paper mill of EasTex in Jasper County, Texas, a 37-year-old railroad tank car, No. UTLX 48028, owned by Union Tank and under lease to Hercules, was being prepared to be shipped out via Santa Fe, carrying turpentine. During this preparation, the tank car's 50-pound dome lid was suddenly blown upward by internal pressure in the car. This lid struck and injured Earl Eilers, an EasTex pipefitter and a Petitioner herein, and struck Glenn Patrick, a pipefitter-helper, in the head, killing him instantly. His widow and children are also Petitioners herein.

Tank car UTLX 48028 was built for, and owned by, Union Tank and was under lease for the hauling of turpentine to Hercules (Pl. Ex. 3; SF 20, 21, 39). This car had been moved from Hercules' plant at Hattiesburg, Mississippi, to EasTex to be loaded with turpentine and returned to Mississippi (SF 39). The tank car was delivered to EasTex by Santa Fe, which also switched it around at EasTex, spotted the car where it was being loaded and where the explosion occurred, and took the car back out on its return to Hercules' Mississippi plant (SF 52, 63).

Union Tank's car had been regularly used by Hercules to haul turpentine on a number of occasions previous to this trip to EasTex (SF 39, 40, 43). The vapors of the turpentine are corrosive and can rust and corrode metal with which they come in contact. (SF 217, 406). The only internal cleaning which had been done on this car after its previous uses in hauling this corrosive matter was to put 140 pounds of ammonia into it (SF 31, 32) — the tank car's capacity is 100,000 pounds, or approximately 12,000 gallons (Pl. Ex. 2, 7, 8; SF 27, 43).

Hercules had regularly hauled turpentine in this Union Tank car since April, 1967, when Hercules, following an inspection of the car, described its condition as only "fair", (Pl. Ex. 2). No repair or maintenance was performed on this car from the time Hercules got it up to the date of the explosion approximately six months later (SF 34, 42, 44, 45).

Union Tank's car No. UTLX 48028 was equipped to be loaded either through a valve on the bottom of the car or through its dome (Pl. Ex. 3; SF 28). EasTex bottom-loaded the car and at least Hercules and Santa Fe were aware of the practice (SF 205, 693-695).

When Union Tank's car was delivered to EasTex by Santa Fe, all or most of the eight retaining bolts which were to bolt down its dome lid were loose and laying back (SF 296, 322, 652). When these bolts were loose and laid back, the dome lid was intended and expected to gradually release any internal pressure in the tank car which was less than the

25 pounds per square inch required to activate its safety valves (Pl. Ex. 5; SF 28, 29, 45, 56, 57).

After Santa Fe spotted Union Tank's car for loading for Hercules, it was connected up for the pumping of turpentine into it through its bottom-loading valve (SF 304, 306). When the cover over this bottom valve was removed prior to connecting up the car, about two gallons of rusty fluid came out (SF 298, 304). This indicated to the EasTex foreman, Sanford Wyble, and the millwright assisting him, Bobby Cryor, that it would be unnecessary to open the dome lid and turn the valve wheel to open the bottom-loading valve, since the valve was already open and the retaining bolts were off the lid and laying back (SF 298, 304). Mr. Wyble decided the car was ready and that no further action would be necessary — so, the pumping of turpentine could and did begin (SF 298, 307).

Until October 15, 1967, no further action by EasTex took place regarding Union Tank's car, except for the pumping of turpentine for Hercules for approximately one hour a day at the rate of 500 gallons an hour (Hercules Ex. 2; SF 212). However, while the car was at EasTex it was regularly yard-checked by Santa Fe personnel (SF 693-695).

On October 15th, it was learned by EasTex personnel that the dome lid would not open (SF 330, 331). There was no indication to EasTex at that time, or any other time, that the lid was struck tight, or was air-tight, or was not gradually releasing the car's internal pressure around its edges as expected (SF 331, 332, 492, 505, 596).

On the morning of Tuesday, October 17, 1967, Union Tank's car was to be prepared to be sent back out via Santa Fe to Hercules' Mississippi plant. Earl Eilers and his assistant, Glenn Patrick, proceeded to the top of the car to open the dome lid to see if the car was full (SF 473, 474). The dome lid's retaining bolts were still laying back, there was nothing to warn either Earl Eilers of Glenn Patrick that the dome lid was not releasing pressure (SF 474, 488, 489, 492, 505, 506).

Instead, pressure was in the tank car (SF 178) and as these two men bent over the 50-pound dome lid to remove it, it blew upward, striking both of them, causing them to fall to the ground, and traveling 75-150 feet through the air before landing (SF 98, 258, 473, 499, 500). Earl Eilers received extensive personal injuries. Twenty-five-year-old Glenn Patrick was killed, leaving a widow and a three-year-old son and a two-year-old daughter.

After this occurence, it was learned that the inside of the dome lid on tank car No. UTLX 48028 was and had been rusted and corroded and that the inside of the car's dome was also rusted and corroded. The rust and corrosion found was more than it would have been merely from the turpentine vapors to which the dome lid had been exposed while the car was at EasTex (SF 217, 259, 549, 550).

Additionally, it was determined that no one had turned the valve wheel inside the car's dome while it was at EasTex (SF 336) and that the valve wheel had only one turn on it, whereas had the bottom valve been opened by someone

using that wheel, it would have had three or four turns on it (SF 334, 335).

As of the morning of October 17, 1967, this tank car had been pumped into for 15 hours, 50 minutes at the rate of 500 gallons an hour (Hercules Ex. 2; SF 212). Therefore, when the occurrence of the dome lid exploding upward took place, the tank car contained a total of approximately 7,920 gallons, or about 66% of the car's capacity of 12,000 gallons (Hercules Ex. 2; SF 27, 43).

Before the safety valves on this tank car, set for 25 pounds per square inch, would activate to release its internal pressure, over 5,000 pounds of force would be exerted on the car's dome lid. (SF 177, 178). This was to have been gradually released around the edges of the dome lid before the pressure built up high enough to activate the safety valves (SF 108, 109, 257, 289).

Instead, the failure of the dome lid to operate properly so as to release the tank car's internal pressure permitted the pressure to build up, resulting in the dome lid blowing up and injuring Earl Eilers and killing Glenn Patrick.

REASONS RELIED ON FOR ALLOWANCE OF THIS WRIT

In this case, Petitioners submit that the Appellate State Courts have committed errors which do violence to the Safety Appliance Acts and the decisions of this Court because they have:

(1) decided a federal question of substance not heretofore specifically determined by this Court; and,

(2) decided a federal question of substance in a way not in accord with, but contrary to, applicable and controlling decisions of this Court.

This case presents the Court with the critical questions of just what the Safety Appliance Acts cover and how and by whom the determination of the Acts' applicability is to be made.

The erroneous position taken by the State Courts is that the appliance in this case, the dome lid of tank car No. UTLX 48028, was not a "safety appliance" as a matter of law.

This mistaken conclusion is shakily — founded on the proposition that only specifically-named appliances, or those used as substitutes therefor, are within the purview of the Acts' absolute protection.[4] Obviously, this completely fails to consider the repeated admonitions of this Court that the Acts must be liberally construed and applied.[5]

Petitioners contend that the Appellate decisions in this case yield a blatantly incorrect result which can only be attained by failing to consider the plan of absolute protection afforded by the Acts, *as applied.*

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[4] *Hercules, Inc. v. Eilers,* 458 S.W. 2d 221 (Beaumont Civ. App., 1970, writ refused, no reversible error) at p. 229.

[5] See, *e.g., United States v. Seaboard Air Line R. Co.,* 361 U.S. 78 (1959) at pp. 82, 83; *Shields v. Atlantic Coast Line R. Co.,* 350 U.S. 318 (1956) at pp. 324, 325; *St. Louis, I. M. & S. Ry. Co. v. Taylor,* cited above, 210 U.S. at pp. 295, 296. See also: *Lilly v. Grand Trunk R. Co.,* 317 U.S. 481 (1943) at p. 486. And see: *Thomas v. Kansas City Southern Ry. Co.,* 305 S.W. 2d 642 (Beaumont Civ. App., 1957, writ refused, no reversible error), *cert. denied* 356 U. S. 959; *Southland Paper Mills, Inc. v. Rhoads,* 434 S.W. 2d 730 (Beaumont Civ. App., 1968).

Petitioners submit that no correct determination of the scope of the Acts can be made by looking only to the Acts and ignoring the cases construing and applying them. The Acts, standing alone, constitute only a skeletal scheme for imposing sanctions for the use of non-complying equipment.

For example, no direct reference to civil liability for personal injuries and property damages is contained in the Acts themselves.

Yet, from the tangential reference in Section 7 regarding the inapplicability of the "assumption of risk" defense to injuries arising from violations of the Acts, together with the title of the original Acts,[6] a substantial jurisprudence has been developed with the aim of affording liberal, remedial, and absolute protection to those such as Glenn Patrick and Earl Eilers.

The unifying principles of the Acts and the proper judicial application thereof are perhaps best demonstrated in *Shields v. Atlantic Coast Line R. Co.*, cited above, 350 U.S. 318.

The *Shields* case involved a Petitioner who was *neither* an "employee" *nor* a "traveler". Still he was afforded the absolute protections of the Acts.[7]

Further, the analysis of this Court clearly indicated that the purposes of the Acts and the satisfaction thereof would

[6] "Safety Appliance and Equipment on Railroad Engines and Cars, and Protection of Employees and Travelers."

[7] 350 U.S. at p. 325.

not be hindered or impeded by the failure of the regulatory agency to act:

> "The fact that the Commission in its 1911 regulations under § 3 has not specified uniform standards for dome running boards is not a binding administrative determination that they are not running boards for the purpose of § 2. * * * there is no showing that the regulations purport to exhaust by implication each category of statutory appliances listed in § 2. Omission of dome running boards of itself shows no more than that the Commission has not standardized all possible running boards within § 2. * * *
>
> * * * * *
>
> "* * * We conclude that failure of the Commission to standardize the dome running board need not mean it was not a required running board under § 2. To hold otherwise would relieve railroads from the absolute duty under § 2 to make safety appliances secure whenever new appliances are adopted which have not yet been standardized by the Commission."[8]

Therefore, even though it was *not* specifically named in the Acts, and *not* standardized by the I.C.C., this Court held that the "dome running board" involved in the *Shields* case *was* a safety appliance within the Acts' contemplation, carrying with it the absolute duties imposed by the Acts.

Indeed, the liberal application of the Acts by this Court began much earlier than the *Shields* case, clearly demonstrating the error of the State Appellate Court result in this case.

Johnson v. Southern Pacific Co., 196 U.S. 1 (1904) posed two vital questions of construction, both of which were

[8] 350 U.S. at pp. 321-323.

resolved *in favor* of the application of the Acts. First, this Court held that a "locomotive" was a "car" which must have automatic couplers, despite the contention that the title of the Acts indicated the intention of Congress to treat "locomotives" and "cars" separately and distinctly.

> "* * * Tested by context, subject-matter, and object, 'any car' meant all kinds of cars running on the rails, including locomotives. * * *"[9]

Further, this Court held that application of the Acts' provisions regarding "automatic couplers" required "*compatible* automatic couplers" which would operate on impact *with each other.* This Court overlaid the requirements of uniformity and compatibility on the stark statutory language requiring "couplers coupling automatically by impact"[10], stating:

> "* * * The object was to protect the lives and limbs of railroad employees by rendering it unnecessary for a man operating the couplers to go between the ends of the cars; and that object would be defeated, not necessarily by the use of automatic couplers of different kinds, but if those different kinds would not automatically couple with each other. *The point was that the railroad companies should be compelled, respectively, to adopt devices, whatever they were, which would act so far uniformly as to eliminate the danger consequent on men going between the cars.*"[11]

The concept of "absolute" duties and the concomitant "absolute" liabilities under the Acts was likewise a matter calling for *Court determination of Congressional intention,*

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[9] 196 U.S. at p. 16.
[10] 45 U.S.C., § 2.
[11] 196 U.S. at pp. 16, 17. (Emphasis Added).

which though not directly stated, this Court declared as follows:

> "* * * The obvious purpose of the legislature was to supplant the qualified duty of the common law with an absolute duty, deemed by it more just. * * * Certainly the statute ought not to be given an absurd or utterly unreasonable interpretation, leading to hardship and injustice, if any other interpretation is reasonably possible. * * * It is quite conceivable that Congress, contemplating the inevitable hardship of such injuries, and hoping to diminish the economic loss to the community resulting from them, should deem it wise to impose their burdens upon those who could measurably control their causes, instead of upon those who are, in the main, helpless in that regard. * * *"[12]

Extension by application of the Acts in order to provide the necessary absolute protection from improperly operating safety appliances was demonstrated in *Texas & Pacific Co. v. Rigsby*, 241 U.S. 33 (1916), when this Court stated:

> "* * * None of the acts, indeed, contains express language conferring a right of action for the death or injury of an employee; but the safety of employees and travelers is their principal object, and the right of private action by an injured employee, even without the employers' liability act, has never been doubted. (Citing cases). * * *"[13]

In *Fairport, P. & E. R. Co. v. Meredith*, 292 U.S. 589 (1934) this Court interpreted the word "travelers", as used within the Acts' title, as transcending merely travelers on

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[12] *St. Louis, I.M. & S. Ry. Co. v. Taylor*, cited above, 210 U.S. at pp. 295, 296. See also: *Chicago, B. & O. Ry. Co. v. United States*, 220 U.S. 559 (1911) at p. 570; *Louisville & Nashville R. Co. v. Layton*, 243 U.S. 617 (1917) at pp. 620, 621; *Brady v. Terminal R. Ass'n.*, 303 U.S. 10 (1938) at p. 15.

[13] 241 U.S. at p. 39.

the railroad and *including* travelers in motor vehicles, exposed to risk of harm at railroad crossings:

> "* * * The most important purpose of a brake upon any vehicle is to enable its operator to check its speed or stop it more quickly than would otherwise be possible. * * * To confine the beneficial effect of these provisions to employees and passengers would be to impute to Congress an intention to ignore the equally important element which their enactment actually contributes to the safety of travelers at highway crossings. *Since all of these three classes of persons are within the mischief at which the provisions are aimed, it is quite reasonable to interpret the statue imposing the duty as including all of them.*"[14]

The opinion in *Davis v. Wolfe*, 263 U.S. 239 (1923) expressed this Court's *refusal* to limit the Acts' absolute protection to only those engaged in activities in which the safety appliance in question was specifically (statutorily) supposed to protect them. Instead, this Court stated:

> "* * * he can recover if the failure to comply with the requirements of the act is a proximate cause of the accident, resulting in injury to him while in the discharge of his duty, *although not engaged in an operation in which the safety appliances are specifically designed to furnish him protection.*"[15]

In *O'Donnell v. Elgin, J. & E. R. Co.*, 338 U.S. 384 (1949) this Court reaffirmed earlier decisions "(sweeping) all issues of negligence out of cases under the Safety Appliance Act."[16] Then, to implement the Acts' manifest purposes, this Court

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[14] 292 U.S. at p. 596. (Emphasis Added).

[15] 263 U.S. at p. 243. (Emphasis Added).

[16] 338 U.S. at p. 390. See also: *St. Louis, I.M. & S.R. Co. v. Taylor*, cited above, 210 U.S. at p. 294; *Chicago, B. & Q.R. Co. v. United States*, cited above, 220 U.S. at pp. 575-577.

construed the Acts' provisions regarding "couplers coupling automatically by impact"[17] as imposing the additional, *but unstated*, requirement that all such couplers "*remain* coupled until set free by some purposeful act of control."[18]

As a result of this construction, the Acts were *applied* to absolutely protect against the risk of harm from couplers disengaging accidently even though there was *no* specific statutory provision.

This Court, *faced with an absence of specific statutory language*, in *Affolder v. New York, C. & St. L. R. Co.*, 339 U.S. 96 (1950) construed the Acts as requiring performance on the occasion in question.

Therefore, this Court concluded that the Plaintiff "did not have to show a 'bad' condition" of the safety appliance in question, since the appliance's failure to operate properly constituted a violation of the Acts' absolute duties[19].

And, as noted above, additional steps beyond the bare statutory and regulatory provisions to mold the Acts into a more effective and liberal means of absolute protection were taken by this Court in *Shields v. Atlantic Coast Line R. Co.*, cited above, 350 U.S. 318.

First, this Court held that a "dome running board" was a safety appliance within the Acts, despite the fact that it

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[17] 45 U.S.C. § 2, cited above.

[18] 338 U.S. at p. 389. (Emphasis Added).

[19] 339 U.S. at pp. 98, 99. See also: *O'Donnell v. Elgin, J. & E.R. Co.*, cited above, 338 U.S. at p. 390; *Carter v. Atlanta & St. A.B.R. Co.*, 338 U.S. 430 (1949) at p. 434.

was not specified in the Acts or standardized in the I.C.C. regulations.[20]

This Court concluded that was no impediment to application and stated:

> "* * * At best, appliances standardized in Commission regulations represent the minimum of safety equipment and there is no prohibition of additional safety appliances. * * *"[21]

Second, this Court established that the injured workman, although an independent contractor working under instructions from the car's consignee and *not* strictly an "employee" or a "traveler", was owed an absolute duty by the hauling railroad under the Acts, stating:

> "* * * Having been upon the dome running board for the purpose of unloading the car, *he was a member of one class for whose benefit that device is a safety appliance under the statute. As to him, the violation of the statute must therefore result in absolute liability.* * * *"[22]

Seventy-eight years have passed since the enactment of the original Acts, but as indicated by the above-cited and quoted cases, this Court has maintained the Acts as a viable and effective means of "Protection of Employees and Travelers". Not by mechanically reciting the admittedly spare statutory language and advising an injured workman or traveler, or the family of one killed, that the Acts' protection did not reach them.

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[20] 350 U.S. at p. 321.
[21] 350 U.S. at p. 324. (Emphasis Added).
[22] 350 U.S. at p. 325. (Emphasis Added).

If that had been the tack, Petitioners submit that W. A. Shields, W. O. Johnson, William O'Donnell's widow, Floyd G. Affolder, Mayme Meredith, and the others to whom protection has been liberally afforded in the cases cited and quoted above, would have been left without a remedy under the Safety Appliances Acts. Without the liberal application of the Acts by this and other Courts to accomodate them, they had no clear, stated protection under the Acts.

Now, what Petitioners in this case urge is simply another application of these Acts which will implement and further the overriding purpose of the Acts — to afford absol te protection to those situated as were Glenn Patrick and Earl Eilers who are exposed to the risk of harm if a safety appliance does not do its job.

The letter and the spirit of the Acts provide the basis for the action sought by Petitioners. The heretofore liberal application of the Acts by this and other Courts provides the means.

It is respectfuly submitted that the narrow and restrictive decision herein by the State Appellate Courts below is completely against the grain of all the above-cited and quoted decisions involving the Safety Appliance Acts and their remedial purposes.

As such, this State decision and the resultant effect upon Petitioners violates their further rights to due process of law

afforded them by the 14th Amendment to the United States Constitution.

> "* * * *nor shall any State deprive any person* of life, liberty, *or property*, without due process of law; * * *" U. S. Const., Am. XIV, § 1. (Emphasis Added).
>
> "* * * if a case between private parties is arbitrarily and capriciously decided, in violation of settled principles of law and contrary to undisputed facts, though the court so deciding had jurisdiction over the suit, the judgment may be in violation of the 14th Amendment. * * *" *Williams v. Tooke*, 108 F. 2d 758 (5th Cir., 1940), *cert. denied* 311 U.S. 655, at p. 759.
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> "Nothing that the State can do will be allowed to destroy the federal right which is to be vindicated * * *". *Board of County Comm'rs v. United States*, 308 U.S. 343 (1939) at p. 350.
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> "That the action of state courts and judicial officers in their official capacities is to be regarded as action of the State within the meaning of the Fourteenth Amendment, is a proposition which has been long established by decisions of this Court. * * *" *Shelley v. Kraemer*, 334 U.S. 1 (1948) at p. 14.
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> "* * * It is not of moment that the State has here acted solely through its judicial branch, for whether legislative or judicial, it is still the application of State power which we are asked to scrutinize." *N.A.A.C.P. v. Alabama*, 357 U.S. 449 (1958) at p. 463.
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> "* * * a State may not, by *any* of its agencies, disregard the prohibitions of the 14th Amendment. *Its judicial authorities may keep within the letter of the statute * * * and yet it might be that its final action would be inconsistent with that Amendment. In determining what is due process of law regard must be had to substance, not to form. * * **" *Chicago, B. & Q. R. Co. v. City of Chicago*, 166 U.S. 226 (1897), at pp. 234, 235 (Emphasis Added).

Petitioners submit they had a *property interest* in their federally-created rights under the Safety Appliance Acts and their respective causes of action arising therefrom, as heretofore liberally applied by the Courts, as well as the Trial Court's judgment for them under said Acts. They have been deprived of that property interest by the decision of the State Appellate Courts.

> "* * * *Whether acting through its judiciary* or through its legislature, *a State may not deprive a person of all existing remedies for the enforcement of a right, which the State has no power to destroy*, unless there is, or was, afforded to him some real opportunity to protect it. * * *" *Brinkerhoff-Faris T. & S. Co. v. Hill*, 281 U.S. 673 (1930) at p. 682. (Emphasis Added).
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> "* * * *a vested right of action is property* in the same sense in which tangible things are property, and is equally protected against arbitrary interference. Whether it springs from contract or the principles of the common law it is not competent for the (State) to take it away. * * *" *Pritchard v. Norton*, 106 U.S. 124 (1882) at p. 132. (Emphasis Added).
>
> "* * * (only) so long as a substantial and efficient remedy remains or is provided due process of law is not denied * * *" *Crane v. Hahlo*, 258 U.S. 142 (1922) at p. 147.

The necessary result of the State Appellate Courts' erroneous decisions in this case has been to deny Petitioners *all* recourse to their right of action derived from the federal Safety Appliance Acts.

This right of action and the Trial Court judgment rendered pursuant thereto, has not merely been changed or altered or affected in some procedural detail — *it has been taken away.*

Petitioners submit this action by the State Appellate Courts by its very nature is arbitrary and capricious, and denies them their 14th Amendment guaranty of due process.

IT CONSTITUTES MANIFEST CONFLICT WITH THE DECISIONS CITED AND QUOTED HEREIN AND SET FORTH IN APPENDIX B — SPANNING 67 YEARS.

The arbitrariness and capriciousness involved here is shown by the conflict between the decision in this case and the treatment and decisions in the cases cited and quoted herein and set out in Appendix B, below. It is *underscored* by the conflict between this case and two other cases from the *same* intermediate State Appellate Court.

In *Thomas v. Kansas City Southern Ry. Co.*, cited above, 305 S.W. 2d 642, it was undisputed that the railroad car involved in that case "* * * was equipped with *all* standardized safety appliances prescribed by the Interstate Commerce Commission for cars of its class, *and they were all secure.*"[23]

Yet, the Beaumont Court of Civil Appeals held that a board laying along the top of the side wall of a gondola car, at the head of a side ladder, fastened in place by bolts, was, as a matter of law, a "handhold" within § 4 of the Safety Appliance Acts. The Court's recognition that it was expanding and liberalizing the coverage of the Acts' absolute duties is clearly shown by its statement of its holding:

> "After much deliberation, and *with no sure nor even satisfactory guide,* * * * we have concluded that within *contemplation* of the Safety Appliance Acts the board that gave way with appellant was, *as a matter of law,* a handhold which appellee was required to have secure."[24]

[23] 305 S.W. 2d at p. 644. (Emphasis Added).
[24] 305 S.W. 2d at p. 645. (Emphasis Added).

Of course, *not one* of the Safety Appliance Acts specifically names or designates any "boards along a top side wall of a gondola car" as a "safety appliance". *Not one* of the Acts specifically says that "substitute grab irons or handholds" are the same as "grab irons and handholds" and are "safety appliances."

In *Southland Paper Mills, Inc. v. Rhoads, cited above,* 434 S.W. 2d 730, the *gasket inside the dome lid* was determined by the Court to be a "safety appliance."[25]

The necessity for such a gasket, and the "safety appliance" character thereof is shown in this statement of the Court:

> "* * * Without a gasket there was nothing to prevent the leaking of soap out of the tank car when it was stopped or received the slamming, backing, and shoving movements the tank car would undergo in the switching process. * * *"[26]

Consequently, the gasket in *Rhoads* was determined by the Court to be:

> "* * * a *safety appliance* to prevent the leaking of the liquid in a tank car where the liquid is sloshed by starting and stopping."[27]

Again, *not one* of the Safety Appliance Acts specifically names or designates "gaskets" as "safety appliances." *Not one* of the Acts specifically names or designates *any* "safety

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[25] 434 S.W. 2d at p. 732.

[26] *Ibid.*

[27] *Ibid.*, (Emphasis Added).

appliance" which must be secure, efficient, or operate properly "to prevent the leaking of liquid in a tank's car", or for which the gasket in *Rhoads* could have been a "substitute".

Obviously, what is involved here goes directly to the substance of Petitioners' property represented by their right of action pursuant to the Acts *and* the judgment entered in their favor by the Trial Court based on violation of the Acts' absolute duties.

The mechanics, or implementation of the assertion of the non-employee's case arising from federally-created rights under the Safety Appliance Acts lie with the State Courts.[28]

The primary thrust of this approach is to preserve, *where applicable* under State law, certain defenses to non-employee cases. See, *e.g.*, *Crane*, cited above; *Meredith*, cited above.

Defenses *not* involved in this case.[29]

However, the mechanics involved *do not and should not alter the substance and purpose of the federal Safety Appliance Acts' absolute protections.*

> "* * * The federal Safety Appliance Act, as we have already said and as this court repeatedly has ruled, *imposes absolute duties upon interstate railway carriers and thereby creates correlative rights in favor of such injured persons as come within its purview;* * * *" *Fairport, P. & E. R. Co. v. Meredith*, cited above, 292 U.S. at p. 598. (Emphasis Added).

[28] *Crane v. Cedar Rapids & I.C.R. Co.*, 395 U.S. 164 (1969) at p. 166; *Meredith*, cited above, 292 U.S. at p. 598.

[29] *Hercules, Inc. v. Eilers*, cited above, 458 S.W. 2d at p. 224; (Tr. 570-593).

> "* * * a failure of equipment to perform as required by the Safety Appliance Act *is in itself an actionable wrong*, * * *" *O'Donnell v. Elgin, J. & E. R. Co.*, cited above, 338 U.S. at p. 390. (Emphasis Added).
>
> "*Once the violation is established*, only causal relation is in issue. * * *" *Carter v. Atlanta & St. A. B. R. Co.*, cited above, 338 U.S. at p. 434. (Emphasis Added).

See also: *Affolder v. New York, C. & St. L. R. Co.*, cited above, 339 U.S. at p. 99; *Moore v. Chesapeake & Ohio Ry. Co.*, cited above, 291 U.S. at p. 213.

So, we are dealing with a right to implement a cause of action *which arises from a series of federal legislation — the Safety Appliance Acts.* That right, when asserted by a non-railroad employee, must be *implemented* in State Court, absent diversity.

But, the right must be preserved and protected in terms of the federal statutes giving rise to it and bearing in mind the federal decisions construing and applying the absolute statutory protection and liabilities.

> "In construing the Federal Safety Appliance Act, as with other Federal Statutes, we must look to the Federal decisions for its interpretation. * * *" *Boyer v. Atchison, T. & S. F. R. Co.*, 230 N.E. 2d 173 (Ill., 1967), *cert. denied* 390 U.S. 949, at p. 176.

Consequently, local practice and procedure, such as the "special issue" practice in Texas and utilized in this case must give way to federal standards.

In *Arnold v. Panhandle & S. F. R. Co.*, 353 U.S. 360 (1957), reversing 283 S.W. 2d 303, the State Court of Civil Appeals had erroneously ruled that a general verdict for the employee was controlled by inconsistent findings on special

issues. The Texas Supreme Court had found no reversible error and likewise reversed.

This Court ejected both the State Courts, holding that the evidence supported the judgment and the railroad had played a part in producing injuries. Further, that the jury's finding on the special issues were not in square conflict with the general finding in favor of Arnold, but that in any case, the local Texas "special issue" procedural practice rules *could not defeat rights under the federal statutes.*

Citing *Rogers v. Missouri Pac. R. Co.*, 353 U.S. 500 (1957); *Webb v. Illinois C. R. Co.*, 352 U.S. 512 (1957); *Ferguson v. Moore-McCormack Lines, Inc.*, 352 U.S. 521 (1957); *Shaw v. Atlantic Coast Line R. Co.*, 353 U.S. 920 (1957); *Futrelle v. Atlantic Coast Line R. Co.*, 353 U.S. 920 (1957); *Deen v. Gulf, C. & S. F. R. Co.*, 353 U.S. 925 (1957) (Texas case); *Thomson v. Texas & Pacific Ry. Co.*, 353 U.S. 926 (1957) (Texas case), it was held that the passageway *as used* was *not* a safe place for Arnold to work in while performing his assigned duties.

This Court stated:

> "* * * *The findings on these special issues do not exhaust all of the possible grounds on which the prior unsafe-place-to-work finding of the jury may have been based.* Hence all of the findings in the case might well be true insofar as the record indicates. *The petitioner having asserted federal rights governed by federal law, it is our duty under the Act to make certain that they are fully protected as the Congress intended them to be. We therefore cannot accept interpretations that nullify their effectiveness, for '* * * the assertion of federal rights when plainly and reasonably made is not to be defeated under the name of local practice.' * * *"*[30]

[30] 353 U.S. at p. 361. (Emphasis Added).

The decisional trend of this Court, exemplified by the Safety Appliance Acts cases cited and quoted above, has clearly rejected qualification of the concept of absolute duty and has consistently liberalized the application of the Safety Appliance Acts both as to appliances within the Acts and classes of persons absolutely protected by the Acts.[31]

The dome lid of a railroad tank car is not specified in any of the Safety Appliance Acts and is not among the regulations of the I.C.C., as of the time of the occurrence in question.[32]

However, Petitioners submit that the dome lid in question constituted, in fact and in law, a "safety appliance" within the spirit and meaning of the federal Safety Appliance Acts as applied and that the absolute duties and liabilities of the Acts apply to the occurrence in question.

The dome lid on tank car No. UTLX 48028 is the *only* pressure venting appliance to release internal pressure in the car until the car's safety valves are activated at 25 pounds per square inch ("psi") (Pl. Ex. 5; SF 28, 29, 45, 56, 57).

Before 25 psi developed inside this tank *over 5,000 pounds of force* would be being exerted on the internal face of the dome lid, enough to blow the lid off long before the safety valves would automatically activate (SF 177, 178).

The dome lid of tank car No. UTLX 48028 was a safety appliance on which Earl Eilers and Glenn Patrick and their

[31] See, *e.g.*, *Shields*, cited above, 350 U.S. 318; *Meredith*, cited above, 292 U.S. 589. See also: McCoid, *The Federal Railroad Safety Acts and the Federal Employers' Liability Act: A Comparison*, 17 Ohio State L. J. 494 (1956).

[32] 49 C.F.R., Part 231, *Transportation*.

fellow workers relied to vent and prevent the build up of pressure within the car (SF 106, 107, 129, 135, 499, 511).

> "* * * those who work on train cars may necessarily have to rely on the security * * *" (of this safety appliance). *Shields v. Atlantic Coast Line R. Co.*, cited above, 350 U.S. at p. 323.

If the pressure could not vent normally under or around the dome lid, the tank car was abnormal (SF 131, 132, 135, 247, 511).

> (This safety appliance) "* * * was required for the proper use of the car." *Shields*, cited above, 350 U.S. at p. 323.

The fact that this dome lid stuck air-tight enabled the internal pressure of tank car No. UTLX 48028 to build up to the point where it blew the lid off, severely injuring Earl Eilers and killing Glenn Patrick (SF 119, 131, 132 135).

> (This safety appliance was used) "* * * not simply because it happened to be there, but also because it had to be there for (them) to perform (their) duties safely. * * *" *Shields, cited above*, 350 U.S. at p. 324.

The duties that Earl Eilers and Glenn Patrick were performing at the time of the explosion were essential to the operation and use of the tank car (SF 470, 474, 488, 497, 499). *Shields*, cited above 350 U.S. at p. 324.

That the dome lid on tank car No. UTLX 48028 was in fact and in law a safety appliance, necessarily required by the purpose and spirit of the Safety Appliance Acts and requiring absolute duties to assure its safe operation, is clearly evidenced through this record.

In this case, the Trial Court performed the traditional Court function of interpreting the meaning of the term "safety appliance" (Tr. 552, 553). Given the Court's definition and interpretation of that term, the jury then performed the fact-finding determination that factual elements existed so that the Safety Appliance Acts did in fact apply to the dome lid of tank car No. UTLX 48028 (Tr. 553).

As the result of its function of interpreting the Safety Appliance Acts, the Trial Court instructed the jury in this case that a "safety appliance" meant:

> "* * * an appliance necessary and furnished for the safe use of a railroad tank car and the proper and efficient operation of which is required for the absolute safety of those whose work takes them on or near a railroad tank car." (Tr. 552, 553).

And, in Special Issue No. 7, the jury was asked if, from a preponderance of the evidence, the dome lid of tank car No. UTLX 48028 was a "safety appliance". The jury answered "Yes". (SF 553).

The Trial Court's definition of "safety appliance" correctly embodied the precise elements stated by this Court in its opinion in *Shields*, cited above, 350 U.S. at p. 323 ("* * * appliances necessary and furnished for the safe use of the car, * * *"); again, at p. 323 ("* * * an absolute and imperative duty, * * *"); at p. 324 ("* * * it had to be there for him to perform his duties safely, and performance of his duties was essential to the operation of the tank car. * * * *"; again, at p. 324 ("* * * * appliances designed to insure safety * * * *"); and, at p. 325 ("* * * * As to him, the

violation of the statute must therefore result in absolute liability. * * * "). These same elements pervade the Courts' consideration of almost every Safety Appliance Acts case because they concisely express the over-all purpose of this series of legislation and the judicial liberalization and extension thereof.[33]

No "interpretation" was performed by the jury in this case. Instead, the jury performed its traditional role of determing whether the facts of this case fit a legal definition — just as when a jury determination is made regarding a "proximate cause." The mere fact that this case deals with absolute liability arising from absolute duties imposed by the United States Congress and continually liberalized by Courts does not alter the respective functions of Court and jury.

> "* * * whether the court or jury is to apply the statute depends upon the usual rules for submission of cases on the evidence — whether reasonable men might differ on the evidence. If they would differ, then the application is for the jury. * * *"[34]

> "* * * Whenever the facts are in dispute the application of the Statute to the facts as found from the evidence is clearly for the jury. * * *"[35]

The primary authority cited and quoted in that portion of the opinion of the intermediate State Court dealing with the issues of "safety appliance" as a question of "law" or

[33] See, *e.g.: Coray v. Southern Pacific Co.*, 335 U.S. 520 (1949); *O'Donnell v. Elgin, J. & E. R. Co.*, cited above, 338 U.S. 384; *Affolder v. New York, C. & St. L. R. Co.*, cited above, 339 U.S. 96.

[34] Crawford, *The Construction of Statutes*, Sec. 182 at p. 306 (1940).

[35] deSloovere, *The Functions of Judge and Jury in the Interpretation of Statutes*, 46 Harv. L. Rev. 1086 (1933) at p. 1095.

"fact",[36] is the 5th Court of Appeals' opinion in *Atlantic Coast Line R. Co. v. Shields*, 220 F. 2d 242 (5th Cir., 1955) which was reversed by this Court in the *Shields* opinion which has been cited and quoted above, 350 U.S. 318.

The questionable character of the 5th Circuit's opinion in *Shields* as "authority" has a further shadow cast on it by this Court's favorable reference in *Shields*,[37] to *Southern Pacific Co. v. Carson*, 169 F. 2d 734 (9th Cir., 1948) which involved the question of whether a *piece of hickory wood* (a brake club) in general use as a lever on tank car hand brakes was *part* of the hand brake, bringing into play the Safety Appliance Acts. The "brake club" in question had broken, injuring the workman. The Trial Court charged the jury, in part, as follows:

> "If you find from a preponderance of the evidence that the hand brake in question would not operate on the tank car in question without the use of a brake club, and if you find further from a preponderance of the evidence that the brake club in question was a necessary part of the hand brake on the tank car, then and in that event only, you may apply the following instructions which I will give you."[38]

There followed instructions requiring the jury to disregard any contributory negligence where there was a "violation of the Safety Appliance Act."[39]

[36] *Hercules, Inc. v. Eilers*, cited above, 458 S.W. 2d at p. 228.
[37] 350 U.S. at p. 323.
[38] 169 F. 2d at p. 736.
[39] *Ibid.*

In the *Carson* case, as in the initial appeal in this case, the *contention* of the Defendant-Appellant was that:

> "* * * *as a matter of law* the brake club *was not* a part of the hand brake *within the intendment of the Safety Appliance Act* and the order of the Interstate Commerce Commission, *hence the court committed reversible error in allowing the jury to determine the question as one of fact.* * * *"[40]

This contention was soundly rebuked by the Court which concluded that in its judicial evaluation of the facts and circumstances of the case, the brake club was, as a matter of law, an "essential part" of the hand brake, and the Acts applied rendering the Defendant-Appellants absolutely liable for the workman's injuries. Insofar as the submission and charge to the jury, the Court stated:

> "* * * Appellant suffered no prejudice because of the submission of the question to the jury."[41]

Petitioners submit that is the case here as well.

Here, the Trial Court correctly determined in its judgment that the dome lid, found by the jury to be a "safety appliance", *was a safety appliance with the Safety Appliance Acts as a matter of law* (Tr. 636). And, that:

> "* * * the jury's verdict establishes liability against the defendants, Union Tank Car Company, Hercules, Inc., Atchison, Topeka & Santa Fe Railway Company, as sued for by the plaintiffs as provided in 45 United States Code Section 1, et seq." (Tr. 636).

In other words, that *as a matter of law* the dome lid was a safety appliance for which Respondents incurred absolute

[40] *Ibid.* (Emphasis Added).
[41] 169 F. 2d at p. 738.

liability, jointly and severally, based on the Acts' absolute duties, since this safety appliance had failed to operate properly and had proximately caused the occurrence in question, as found by the jury (Tr. 553).

Petitioners submit that the action of the intermediate State Court in reversing the Trial Court's judgment amounted to error — both as a wrongful usurpation of the jury's function and as a clearly erroneous reweighing of the facts to arrive at a wrong legal conclusion on "a matter of law" — and that the dome lid in question *was* a safety appliance within the Safety Appliance Acts *in fact and in law.*

Clearly, Glenn Patrick and Earl Eilers were in a class of persons protected by the Safety Appliance Acts.[42]

No act or omission of either Glenn Patrick or Earl Eilers was found by the jury to have been negligence proximately causing the occurrence in question (Tr. 479-586).[43]

Further, the jury *refused* to find that any conduct on the part of "EasTex, Inc., its supervisors, foreman or employees, * * * either individually or in combination, was the sole cause of the accident in question." (Tr. 592).

And the jury found that the occurrence in which Glenn Patrick was killed and Eilers injured was *not* an "unavoidable accident" (Tr. 593).

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[42] *Shields v. Atlantic Coast Line R. Co.*, cited above, 350 U.S. at p. 325; *Barney v. Staten Island R. T. Ry. Co.*, 316 F. 2d 38 (3rd Cir., 1963), *cert. denied* 375 U.S. 826, at p. 40.

[43] *Cf. Crane v. Cedar Rapids & I. C. Ry. Co.*, cited above, 395 U.S. 164.

Instead, the jury found that the occurrence *was* proximately caused by the failure of the tank car's dome lid to operate properly to release the car's internal pressure (Tr. 553).

Therefore, the factors in the *Crane* case, cited above, with reference to the presence of contributory negligence and the absence of proximate cause findings, are *not* involved in this case.

The plain effect of the decision of the intermediate State Court in this case is to erroneously impose, with unduly harsh results, the constructional rule of *expressio unis est exclusio alterius*. Petitioners submit that rule has no place here and does not serve as a proper guide to legislative intent in this instance.

The "*expressio unis*" rule was urged unsuccessfully by the Defendant-Respondent in *Johnson v. Southern Pacific Co.*, cited above, 196 U.S. 1, and solidly rejected by this Court:

> "* * * it is said * * * that the rule that the expression of one thing excludes another applies. *That, however, is a question of intention*, and there was *special reason* for requiring locomotives to be equipped with power driving-wheel brakes, *if it is also necessary that locomotives should be equipped with automatic couplers, and the word 'car' would cover locomotives, then the intention to limit the equipment of locomotives to power driving-wheel brakes, because they were separately mentioned, could not be imputed.* * * *"[44]

[44] 196 U.S. at p. 15. (Emphasis Added).

This Court continued that insofar as achieving the object of the Acts:

> "* * * it was as necessary for the safety of employees in coupling and uncoupling that locomotives be equipped with automatic couplers as it was that freight and passenger and dining cars should be; perhaps more so, * * *"[45]

It was as necessary to the safety of Glenn Patrick and Earl Eilers that tank car No. UTLX 48028 have a properly operating, pressure venting dome lid, as it was for the tank car to have grab irons, running boards, automatic couplers, or any of the other specifically named safety appliances — clearly more so.

And it was certainly as important to the object of the Acts — "*Protection of Employes and Travelers*".

Petitioners submit that this case is within, and calls for, the absolute duties and liabilities of the Safety Appliance Acts. That this case, crystallizing the abject need of workers on railroad cars to have absolute protection from insidious dangers, requires a continuation of the heretofore consistent, liberal application of the Acts.

The decisions of the State Appellate Courts erroneously depart from this consistency and directly conflict with the precepts and results of this Court's decisions in *Shields*, *Coray*, *Affolder*, *Johnson*, *O'Donnell*, *Brady*, *Meredith*, *Rigsby*, *Taylor*, cited and quoted above. See also: Appendix B.

[45] *Ibid.*

Therefore, Petitioners pray that this Court will grant their Petition for Writ of Certiorari and that the decisions of the State Appellate Courts will be reversed.

Respectfully submitted,

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Counsel for Petitioners.

CERTIFICATE OF SERVICE

I hereby certify that I am a member of the United States Supreme Court bar and one of the counsel of record for the Petitioners herein and that, on the ..... day of ....., 1971, three (3) copies of the above and foregoing Petition for Writ of Certiorari were served on each party represented herein, pursuant to United States Supreme Court Rule 33, Para. 1, by depositing same in the United States post office, Jasper, Texas, with first class postage prepaid, and properly addressed to their respective counsel of record at the post office address of each, to wit:

Respondent, Hercules, Inc., to its counsel of record: Mr. Richard B. Miller, Baker, Botts, Shepherd & Coates, 1 Shell Plaza, Houston, Texas 77001.

Respondent, Union Tank Car Company, to its counsel of record: Mr. George A. Weller, Weller, Wheelus, Green & Brocato, Beaumont Savings Building, Beaumont, Texas 77701.

Respondent, Atchison, Topeka & Santa Fe Railroad Company, to its counsel of record: Mr. Chilton O'Brien, O'Brien & Richards, Petroleum Building, Beaumont, Texas 77701.

Tonahill Building
Jasper, Texas 75951

APPENDIX A

THE FEDERAL SAFETY APPLIANCE ACTS, 27 STAT. 531 (1893), AS AMENDED, 45 U. S. C. § 1, ET SEQ., TITLED:

> *"Safety Appliances and Equipment on Railroad Engines and Cars, and Protection of Employees and Travelers"*

§ 1. *Driving-wheel brakes and appliances for operating train-brake system*

It shall be unlawful for any common carrier engaged in interstate commerce by railroad to use on its line any locomotive engine in moving interstate traffic not equipped with a power driving-wheel brake and appliances for operating the train-brake system, or to run any train in such traffic that has not a sufficient number of cars in it so equipped with power or train brakes that the engineer on the locomotive drawing such train can control its speed without requiring brakemen to use the common hand brake for that purpose. Mar. 2, 1893, c. 196, § 1, 27 Stat. 531.

§ 2. *Automatic couplers*

It shall be unlawful for any common carrier engaged in interstate commerce by railroad to haul or permit to be hauled or used on its line any car used in moving interstate traffic not equipped with couplers coupling automatically by impact, and which can be uncoupled without the necessity of men going between the ends of the cars. Mar. 2, 1893, c. 196, § 2, 27 Stat. 531.

§ 3. *Refusal of insufficiently equipped cars from connecting lines*

When any person, firm, company, or corporation engaged in interstate commerce by railroad shall have equipped a sufficient number of its cars so as to comply with the provisions of section 1 of this title, it may lawfully refuse to receive from connecting lines of road or shippers any cars

not equipped sufficiently, in accordance with said section, with such power or train brakes as will work and readily interchange with the brakes in use on its own cars, as required by sections 1-7 of this title. Mar. 2, 1893, c. 196, § 3, 27 Stat. 531.

§ 4. *Grab irons or handholds for security in coupling and uncoupling cars*

Until otherwise ordered by the Interstate Commerce Commission, it shall be unlawful for any railroad company to use any car in interstate commerce that is not provided with secure grab irons or handholds in the ends and sides of each car for greater security to men in coupling and uncoupling cars. Mar. 2, 1893, c. 196, § 4, 27 Stat. 531.

§ 5. *Standard height of drawbars for freight cars; non-complying cars excluded from traffic*

No freight cars, either loaded or unloaded, shall be used in interstate traffic which do not comply with the prescribed standard as to height of drawbars. Mar. 2, 1893, c. 196, § 5, 27 Stat. 531.

§ 6. *Failure to equip cars as provided; duty of United States attorneys and Secretary of Transportation; exceptions from operation of provisions*

Any common carrier engaged in interstate commerce by railroad using any locomotive engine, running any train, or hauling or permitting to be hauled or used on its line any car in violation of any of the provisions of sections 1-7 of this title, shall be liable to a penalty of $250 for each and every such violation, to be recovered in a suit or suits to be brought by the United States attorney in the district court of the United States having jurisdiction in the locality where such violation shall have been committed; and it shall be the duty of such United States attorney to bring such suits upon duly verified information being lodged with him of such violation having occurred; and it shall also be the duty of the Secretary of Transportation to lodge with the

proper United States attorneys information of any such violations as may come to his knowledge: *Provided*, That nothing in sections 1-7 of this title shall apply to trains composed of four-wheel cars or to trains composed of eight-wheel standard logging cars where the height of such car from top of rail to center of coupling does not exceed twenty-five inches, or to locomotives used in hauling such trains when such cars or locomotives are exclusively used for the transportation of logs. As amended Aug. 14, 1957, Pub.L. 85-135, § 1(1), 71 Stat. 352.

§ 7. *Assumption of risk by employees*

Any employee of any common carrier engaged in interstate commerce by railroad who may be injured by any locomotive, car, or train in use contrary to the provision of sections 1-7 of this title shall not be deemed thereby to have assumed the risk thereby occasioned, although continuing in the employment of such carrier after the unlawful use of such locomotive, car, or train had been brought to his knowledge. Mar. 2, 1893, c. 196, § 8, 27 Stat. 532.

§ 8. *Provisions of certain sections extended*

The provisions and requirements of sections 1-7 of this title shall be held to apply to common carriers by railroads in the Territories and the District of Columbia and shall apply in all cases, whether or not the couplers brought together are of the same kind, make, or type; and the provisions and requirements relating to train brakes, automatic couplers, grab irons, and the height of drawbars shall be held to apply to all trains, locomotives, tenders, cars, and similar vehicles used on any railroad engaged in interstate commerce, and in the Territories and the District of Columbia, and to all other locomotives, tenders, cars, and similar vehicles used in connection therewith, excepting those trains, cars, and locomotives exempted by the provisions of section 6 of this title, or which are used upon street railways. Mar. 2, 1903, c. 976, § 1, 32 Stat. 943.

§ 9. *Power or train brakes; operation by engineer; rules for installation, inspection, maintenance, and repair*

Whenever, as provided in sections 1-7 of this title, any train is operated with power or train brakes not less than 50 per centum of the cars in such train shall have their brakes used and operated by the engineer of the locomotive drawing such train; and all power-braked cars in such train which are associated together with said 50 per centum shall have their brakes so used and operated; and, to more fully carry into effect the objects of said sections, the Secretary of Transportation may, from time to time, after full hearing, increase the minimum percentage of cars in any train required to be operated with power or train brakes which must have their brakes used and operated as aforesaid. One hundred and twenty days after the date of enactment of the Power or Train Brakes Safety Appliance Act of 1958, the Secretary of Transportation shall adopt and put into effect the rules, standards, and instructions of the Association of American Railroads, adopted in 1925 and revised in 1933, 1934, 1941, and 1953, with such revisions as may have been adopted prior to the enactment of such Act, for the installation, inspection, maintenance, and repair of all power or train brakes for common carriers engaged in interstate commerce by railroad. Such rules, standards, and instructions shall thereafter remain the rules, standards, and instructions for the installation, inspection, maintenance, and repair of all power or train brakes unless changed, after hearing, by order of the Secretary of Transportation: *Provided, however,* That such rules or standards or instructions or changes therein shall be promulgated solely for the purpose of achieving safety. The provisions and requirements of this section shall apply to all trains, locomotives, tenders, cars, and similar vehicles used, hauled, or permitted to be used or hauled, by any railroad engaged in interstate commerce. In the execution of this section, the Secretary of Transportation may utilize the services of the Association of American Railroads, and may avail itself of the advice and assistance of any department, commission, or board of the United States Government, and of State governments, but no offi-

cial or employee of the United States shall receive any additional compensation for such service except as now permitted by law. Failure to comply with any rule, regulation, or requirement promulgated by the Secretary of Transportation pursuant to the provisions of this section shall be subject to the like penalty as failure to comply with any requirement of this section. As amended Apr. 11, 1958, Pub.L. 85-375, 72 Stat. 86.

§ 10. *Former duties, requirements, and liabilities continued unless specifically amended*

Nothing in sections 8 and 9 of this title shall be held or construed to relieve any common carrier, the Interstate Commerce Commission, or any United States attorney from any of the provisions, powers, duties, liabilities, or requirements of sections 1-7 of this title, and all of such provisions, powers, duties, requirements, and liabilities shall, except as specifically amended by sections 8 and 9 of this title, apply thereto. Mar. 2, 1903, c. 976, § 3, 32 Stat. 943; June 25, 1948, c. 646, § 1, 62 Stat. 909.

§ 11. *Safety appliances required for each car; when hand brakes may be omitted*

It shall be unlawful for any common carrier subject to the provisions of sections 11-16 of this title to haul, or permit to be hauled or used on its line, any car subject to the provisions of said sections not equipped with appliances provided for in said sections, to wit: All cars must be equipped with secure sill steps and efficient hand brakes; all cars requiring secure ladders and secure running boards shall be equipped with such ladders and running boards, and all cars having ladders shall also be equipped with secure handholds or grab irons on their roofs at the tops of such ladders: *Provided*, That in the loading and hauling of long commodities, requiring more than one car, the hand brakes may be omitted on all save one of the cars while they are thus combined for such purpose. Apr. 14, 1910, c. 160, § 2, 36 Stat. 298.

§ 12. ***Safety appliances, as designated by commission, to be standards of equipment; modification of standard height of drawbars***

The number, dimensions, location, and manner of application of the appliances provided for by sections 4 and 11 of this title as designated by the Interstate Commerce Commission shall remain as the standards of equipment to be used on all cars subject to the provisions of sections 11-16 of this title, unless changed by an order of said Interstate Commerce Commission, to be made after full hearing and for good cause shown; and failure to comply with any such requirement of the Interstate Commerce Commission shall be subject to a like penalty as failure to comply with any requirement of sections 11-16 of this title. Said commission is given authority, after hearing, to modify or change, and to prescribe the standard height of drawbars and to fix the time within which such modification or change shall become effective and obligatory, and prior to the time so fixed it shall be unlawful to use any car or vehicle in interstate or foreign traffic which does not comply with the standard now fixed or the standard so prescribed, and after the time so fixed it shall be unlawful to use any car or vehicle in interstate or foreign traffic which does not comply with the standard so prescribed by the commission. Apr. 14, 1910, c. 160, § 3, 36 Stat. 298.

§ 13. ***Penalty for using car not equipped as provided; hauling car for repairs where equipment becomes defective; liability for death or injury of employee; use of chains instead of drawbars***

Any common carrier subject to sections 11-16 of this title using, hauling, or permitting to be used or hauled on its line, any car subject to the requirements of said sections not equipped as provided in said sections, shall be liable to a penalty of $250 for each and every such violation, to be recovered as provided in section 6 of this title: *Provided*, That where any car shall have been properly equipped, as provided in sections 1-16 of this title, and such equipment

shall have become defective or insecure while such car was being used by such carrier upon its line of railroad, such car may be hauled from the place where such equipment was first discovered to be defective or insecure to the nearest available point where such car can be repaired, without liability for the penalties imposed by this section or section 6 of this title, if such movement is necessary to make such repairs and such repairs cannot be made except at such repair point; and such movement or hauling of such car shall be at the sole risk of the carrier, and nothing in this section shall be construed to relieve such carrier from liability in any remedial action for the death or injury of any railroad employee caused to such employee by reason of or in connection with the movement or hauling of such car with equipment which is defective or insecure or which is not maintained in accordance with the requirements of sections 1-16 of this title; and nothing in this proviso shall be construed to permit the hauling of defective cars by means of chains instead of drawbars, in revenue trains or in association with other cars that are commercially used, unless such defective cars contain livestock or "perishable" freight. As amended Aug. 14, 1957, Pub.L. 85-135, § 1(2), 71 Stat. 352.

§ 14. ***Liability for using car with defective equipment, except as specified***

Except that, within the limits specified in section 13 of this title the movement of a car with defective or insecure equipment may be made without incurring the penalty provided by the statutes, but shall in all other respects be unlawful, nothing in sections 11-16 of this title shall be held or construed to relieve any common carrier, the Interstate Commerce Commission, or any United States attorney from any of the provisions, powers, duties, liabilities, or requirements heretofore set out in sections 1-10 of this title; and, except as aforesaid, all of such provisions, powers, duties, requirements, and liabilities shall apply to sections 11-16 of this title. Apr. 14, 1910, c. 160, § 5, 36 Stat. 299.

§ 15. *Enforcement by commission*

It shall be the duty of the Interstate Commerce Commission to enforce the provisions of sections 11-16 of this title as to equipment of each car with safety appliances and all powers heretofore granted to said commission are extended to it for the purpose of such enforcement. Apr. 14, 1910, c. 160, § 6, 36 Stat. 299.

§ 16. *Application of provisions to common carriers and vehicles subject to "Safety Appliance Acts"*

The provisions of sections 11-16 of this title, as to the equipment of cars with the designated safety appliances apply to every common carrier and every vehicle subject to what are commonly known as the "Safety Appliance Acts" set out in sections 1-10 of this title. Apr. 14, 1910, c. 160, § 1, 36 Stat. 298.

APPENDIX B

Plaintiffs submit that the decision and result herein is in direct and irreconcilable conflict with 67 years of decisions by this Court, Federal District and Appeals Courts, and various State Court decisions, including:

Affolder v. New York C. & St. L. R. Co., 339 U.S. 96 (1950).

Arnold v. Panhandle & S. F. Ry. Co., 353 U.S. 360 (1957).

Barney v. Staten Island R. T. Ry. Co., 316 F. 2d 38 (3rd Cir., 1963), *cert. denied* 375 U.S. 826.

Boyer v. Atchison, T. & S. F. Ry. Co., 230 N.E. 2d 173 (Ill., 1967), *cert. denied* 390 U.S. 949.

Brady v. Terminal R. Ass'n., 303 U.S. 10 (1938).

Carter v. Atlanta & St. A. B. Ry. Co., 338 U.S. 430 (1949).

Coray v. Southern Pacific Co., 335 U.S. 520 (1949).

Davis v. Wolfe, 263 U.S. 239 (1923).

Fairport, P. & E. R. Co. v. Meredith, 292 U.S. 589 (1934).

Johnson v. Southern Pacific Co., 196 U.S. 1 (1904).

Lilly v. Grand Trunk R. Co., 317 U.S. 481 (1943).

Louisville & Nashville R. Co. v. Layton, 243 U.S. 617 (1917).

Mills v. Mitsubishi Shipping Co., 358 F. 2d 609 (5th Cir., 1966), *cert. denied* 386 U.S. 1036.

Moore v. Chesapeake & Ohio Ry. Co., 291 U.S. 205 (1934).

Myers v. Reading Co., 331 U.S. 477 (1947).

O'Donnell v. Elgin, J. & E. R. Co., 338 U.S. 384 (1949).

Philadelphia & R. Ry. Co. v. Auchenbach, 16 F. 2d 550 (3rd Cir., 1926), *cert. denied* 273 U.S. 761.

Pope & Talbot, Inc. v. Hawn, 346 U.S. 406 (1953).

Rodgers v. Conemaugh & B. L. R. Co., 137 F. Supp. 467 (W.D., Pa., 1962)

St. Louis, I. M. & S. Ry. Co. v. Taylor, 210 U.S. 281 (1908).

Seas Shipping Co. v. Sieracki, 328 U.S. 85 (1946).

Shields v. Atlantic Coast Line R. Co., 350 U.S. 318 (1956).

Southern Pacific Co. v. Carson, 169 F. 2d 734 (9th Cir., 1948).

Southland Paper Mills, Inc. v. Rhoads, 434 S.W. 2d 730 (Beaumont Civ. App., 1968).

Texas & Pacific Ry. Co. v. Rigsby, 241 U.S. 33 (1916).

Thomas v. Kansas City Southern Ry. Co., 305 S.W. 2d 642 (Beaumont Civ. App., 1957, writ refused, no reversible error), *cert. denied* 356 U.S. 959.

Trout v. Pennsylvania R. Co., 300 F. 2d 826 (3rd. Cir., 1962).

Zimmerman v. Montour R. Co., 296 F. 2d 97 (3rd Cir., 1961), *cert. denied* 369 U.S. 828.

APPENDIX C

No. 7108

HERCULES, INC., et al,

Appellants,

v.

EARL EILERS AND PEGGY PATRICK, et al,

Appellees.

Glenn Patrick was killed and Earl Eilers seriously injured when a dome lid on a railroad tank car blew off, knocking them to the ground. They were employees of EasTex, Inc. (hereinafter "EasTex"), owner of a papermill at Evadale, Texas. Union Tank Car Company (hereinafter "Union Tank") leased a tank car to Hercules, Inc. (hereinafter "Hercules") for the purpose of transporting crude turpentine to the plant of Hercules in Hattiesburg, Mississippi. The Atchison, Topeka and Santa Fe Railway Company (hereinafter "Santa Fe") was the delivering carrier of the empty car to EasTex.

In this action, Eilers and Mrs. Patrick and her children (hereinafter referred to collectively as "plaintiffs") were joined by the subrogated Workmen's Compensation Insurance carrier, but we need take no further notice of the latter's presence. Plaintiffs named Hercules, Union Tank and Santa Fe as defendants. Upon certain findings of the jury which we will discuss later, judgment was rendered for plaintiffs and against the defendants, jointly and severally.

The tank car in question, empty except for 140 pounds of liquid ammonia to inhibit corrosion, was shipped by Hercules from Hattiesburg, Mississippi, on September 1, 1967, to EasTex in Evadale, Texas, where it was delivered by Santa Fe as the final carrier. The record is silent as to what, if anything, was done with the car until October 4, when

Santa Fe placed it on the turpentine track in the plant of EasTex. The car was equipped with valves which permitted the car to be "bottom-loaded" with raw turpentine by EasTex. Ordinarily, in order to do so, it was necessary for the dome lid to be raised and a wheel located therein turned so as to open the valve on the bottom of the car. The dome cover or lid was kept in place while the car was in transit by a number of large hinged bolts, which laid down on the top of the car itself after the retaining wing nuts were removed from the bolts.

Hercules offered as its witness a former employee of EasTex, Wells, who testified that in the course of preparing to pump turpentine into the car, he opened the valves thereon after lifting the lid from the dome. Plaintiffs, on the other hand, offered testimony that the bolts holding the lid in place were laying upon the top of the car when it was spotted by Santa Fe and that it was unnecessary to open the valves before pumping started.[1] In any event, EasTex began loading the car on October 4, and continued pumping from time to time as turpentine was produced until the morning of October 17, when the accident occurred. However, EasTex had discovered on October 15 that the lid was stuck so tightly to the dome that an EasTex workman was unable to dislodge it although he struck it with a large pipe wrench and used a heavy piece of pipe in an effort to prize the lid loose from the dome. The pipefitter, Rush, failing in his efforts to remove the cover, reported to Leroy Mitchell, the tour foreman for EasTex on duty at the time, that it was stuck. Rush and Mitchell had a discussion concerning the methods to be used in removing the cover, including the use of a hydraulic jack. However, it was Sunday, and Rush was on a special callout, as distinguished from his regular tour of duty, and they never came to any agreement as to what means would be used to dislocate the stuck lid.

[1] The jury was unable to answer Special Issue No. 62, inquiring if EasTex personnel opened the dome cover after delivery of the car to EasTex by Santa Fe; and, the succeeding issue as to closure, being conditionally submitted, was likewise unanswered. Our disposition of the case does not require further exploration of this facet of the matter.

During the time the car was on the turpentine track, between October 4 and October 17, EasTex pumped turpentine into the car upon each day for a total of fifteen hours and fifty minutes. Turpentine was pumped into the car for an hour upon October 16 and for an hour again on October 17, *after* it had been learned that the lid was stuck tightly to the dome. The pumping was stopped at 7:50 a.m., October 17, and the accident occurred ten minutes later.

The car was equipped with standard safety valves approved by the regulatory authorities, designed to relieve internal pressure when it exceeded 25 pounds per square inch (hereinafter "psi"). With bottom loading under pressure, there was no way for the air in the tank to escape except through the dome; and, with the lid stuck tight, pressure in the car increased as pumping into the car continued. EasTex, without notifying either Eilers or Patrick that the dome lid had been stuck for two days while the pumping continued, sent them to the top of the car to close the bottom valve so that the car could be shipped. Eilers, the only person in position to testify, stated that just as they got upon the top of the car, the dome lid blew off, killing Patrick and injuring him.

The court submitted more than a hundred special issues in which the jury was subjected to cross-examination upon every theory of law and fact which came to the minds of the inventive and resourceful counsel for the several parties. In essence, the jury failed to find any common-law negligence on the part of any defendant, acquitted Eilers and Patrick of contributory negligence, failed to find that any act or omission of EasTex was the sole cause of the accident, and found that the car was reasonably suited for the purpose for which it was intended, both at the time it was delivered to EasTex and at the time of the accident.

The jury found that the safety valves upon the car were "safety appliances" under the court's definition, but nullified the effect, if any of the finding by failing to find that the valves did not "perform properly." The jury also found that the dome lid "which was to release the car's internal

pressure around its edges when not bolted tight" was a safety appliance under the court's definition; that the dome lid "failed to operate properly to release the car's internal pressure"; and that this was a proximate cause of the occurrence. We will have occasion to comment more in detail upon these and the remaining issues in connection with our discussion of the questions presented.

The motions of the several defendants for judgment non obstante veredicto, to disregard certain findings, and to enter judgment for the defendants were each overruled. Judgment was rendered in favor of the several plaintiffs against the defendants jointly and severally, from which this appeal is prosecuted.[2] The record is lengthy, the briefs are prolix, and many questions are presented for our consideration. Since the liability is based upon the asserted applicability of the Safety Appliance Act, we first consider the Act itself.

The Safety Appliance Act (*45 U.S.C.A. § 1*, et seq.) [hereinafter "Act"] does not mention every component making up a car used upon railroad lines. Instead, it is very limited in its scope, although liberally construed by the courts.[3] The Act makes it unlawful for any carrier to use on its lines a locomotive engine not equipped with a power-driving wheel brake, or to run a train that has not a sufficient number of cars in it so equipped with power or train brakes that the engineer on the locomotive drawing such train can control its speed without requiring brakemen to use the common hand brake for that purpose (45 U.S.C.A. § 1); or to use on its line a car "not equipped with couplers coupling automatically by impact, and which can be uncoupled without the necessity of men going between the ends of the cars" (*Id.* § 2); or, until otherwise ordered by the Interstate Commerce Commission (hereinafter "ICC")

[2] Eilers was awarded $42,000.00 for his injuries; Mrs. Patrick, the widow *and* each of the two minor children recovered $80,000.00 and Mrs. Patrick recovered, on behalf of the community estate, $1,500.00 funeral expenses.

[3] For a discussion of a few of the cases on liberality of construction of the Act, see *Missouri-Kansas-Texas R. Co. v. Evans*, 151 Tex. 340, 250 S.W. 2d 385, 398 (1952).

to use a car "that is not provided with secure grab irons or handholds in the ends and sides of each car for greater security to men in coupling and uncoupling cars," (*Id.* § *4*); or to use freight cars, either loaded or unloaded which do not comply with the prescribed standards as to height of drawbars (*Id.* § *5*).

Section 11 of the Act reads:

> "It shall be unlawful for any common carrier subject to the provisions of sections 11-16 of this title to haul, or permit to be hauled or used on its line, any car subject to the provisions of said sections not equipped with appliances provided for in said sections, to wit: All cars must be equipped with secure sill steps and efficient hand brakes; all cars requiring secure ladders and secure running boards shall be equipped with such ladders and running boards, and all cars having ladders shall also be equipped with secure handholds or grab irons on their roofs at the tops of such ladders: *Provided*, That in the loading and hauling of long commodities, requiring more than one car, the hand brakes may be omitted on all save one of the cars while they are thus combined for such purpose. (Emphasis in Act.)

Other provisions of the Act (specifically §§ 12 and 15) grant to the ICC authority to adopt regulations interpreting and standardizing the requirements of the Act as to require safety appliances, and these regulations prescribe detail standards of construction and inspection.[4]

As to the appliances mentioned in the Act itself, the criterion by which the sufficiency of such appliances is to be judged is the essence of simplicity. Thus, sill steps must be *secure;* hand brakes must be *efficient;* cars requiring secure ladders and secure running boards shall be equipped with "*such* ladders and running boards"; and, cars having ladders shall be equipped with *secure* handholds or grab

[4] In 1969 this administrative duty was transferred from the Interstate Commerce Commission to the Department of Transportation. *49 U.S.C.A. § 1655 (e) (1).*

irons on their roofs at the top of such ladders.[5] There is no permissible deviation from the standard so set by the Act itself as to the appliances mentioned therein. But, it is equally clear that the Act does not require a perfect car in its entirety. There is no mention, for instance, of wheels which will not break or of doors which are securely attached so as not to fall, or for that matter, dome lids which will not blow off when too much internal pressure is applied in loading a car. These latter instances of the wheels, the doors, and the dome lids find no specific mention in the Act itself.

This court, in *Kansas City Southern Railroad Company v. Guillory*, 376 S.W. 2d 72, 74 (Tex. Civ. App. — Beaumont, 1964, error ref. n.r.e.), spoke of the general rule governing the obligation and duty of a carrier in furnishing cars to consignors and consignees, saying:

> "* * * there seems to be a general unanimity of authority that a railway company is required to exercise ordinary care in order that a reasonably safe car may be furnished for those using it, 75 C.J.S. Railroads § 924, pp. 333-336, * * *"

In addition to the authorities considered in *Guillory*, attention is called to the exhaustive annotation to be found in *99 A.L.R. 2d, 176, et seq.* "Railroad — Loading or Unloading — Injury," where cases from many jurisdictions are collated. As to non-employees, the rule is, except in the so-called "penalty violations" arising from a breach of the duty imposed by the Safety Appliance Act or the Boiler Inspection Act *(45 U.S.C.A. § 22,* et seq.), that there must be a finding of a breach of the duty of exercising ordinary care, i.e., negligence, proximately causing injury before liability can be imposed. Defendants procured a finding

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[5] Counsel for Hercules, commenting upon the finding of the jury that the dome lid in question "failed to operate properly" (Special Issue No. 8 mentioned hereinafter), aptly remarks:

"But an engrafted requirement that some appliance 'operate properly' is about as vague as the Boy Scout motto, 'Be Prepared.' Must a dome cover be 'secure' or 'efficient' or 'tight' or 'loose?' There is simply no statutory standard a dome cover must meet."

that the car furnished to EasTex was reasonably suited for the purposes for which it was intended, Special Issue No. 88-A, discussed hereinafter. In this case, plaintiffs make no effort to support the judgment upon the rule of law enunciated in this paragraph.

Instead, in a "Summary of the Propositions Presented", plaintiffs say:

> "I. This is a case governed by the Safety Appliance Acts, 45 USC, Section 1, et seq., and the cases interpreting and liberalizing the Acts' coverage and effects.
>
> * * * * *
>
> "C. The dome lid on tank car No. UTLX 48028 was a safety appliance within the meaning and spirit of the Safety Appliance Acts as applied."

For the reasons set hereinafter, we disagree.

Plaintiffs' first series of counter-points (Nos. 1-4), brings into focus their contention announced above: that the dome lid was a safety appliance under the Act; and it is said, since it failed to vent the internal pressure created by the bottom-loading of the car, absolute liability followed as a matter of law. The major premise — that the dome lid was a safety appliance under the Act — is said to find support in the jury verdict, but no statutory or case law is submitted to establish such assertion. The series of issues (all answered affirmatively) brought forward for consideration are these:

> *Special Issue No. 7:* "Do you find from a preponderance of the evidence that the dome lid on tank car No. 48028 which was to release the car's internal pressure around its edges when down but not bolted tight [sic] was a safety appliance?[6]
>
> "By the term 'safety appliance' is meant an appliance necessary and furnished for the safe use of a railroad tank car and the proper and efficient operation of which is required for the absolute safety of those whose work takes them on or near a railroad tank car."

[6] We do not reach defendants' complaints addressed to the form and content of the issue and its accompanying definition.

Special Issue No. 8: "* * * the dome lid on tank car No. 48028 failed to operate properly to release the car's internal pressure?"[1]

Special Issue No. 9: "* * * [which] was a proximate cause of the occurrence in question?"

At the outset, we remove from the area of contention certain well-recognized principles of law applicable in cases involving the Act. For the purpose of this immediate discussion, *we assume in cases involving appliances mentioned in the Act*, that these rules apply:

(a) Eilers and Patrick were members of a "class for whose benefit that device is a safety appliance under the statute. As to him [them], the violation of the statute must therefore result in absolute liability." *Shields v. Atlantic Coast Line Railroad Co.*, 350 U.S. 318, 325, 76 S. Ct. 386, 100 L. Ed. 364 (1955) and cases therein cited.

(b) The violation of the statute results in absolute liability since the duty imposed is an absolute one. *Shields*, supra; *Brady v. Terminal Railroad Association*, 303 U.S. 10, 15, 58 S. Ct. 426, 82 L. Ed. 614 (1937); *Thomas v. Kansas City Southern Railway Co.*, 305 S.W. 2d 642, 646 (Tex. Civ. App. — Beaumont, 1957, error ref., n.r.e.), cert. den., 356 U.S. 959, 78 S. Ct. 995, 2 L. Ed. 2d 1066.

(c) The Act did not create a cause of action and the non-employee, such as Eilers and Patrick, "must look for his remedy to the common-law action in tort, * * * [and] * * * the definition of causation and the availability of the defenses of assumption of the risk and contributory negligence are left to state law." *Crane v. Cedar Rapids & Iowa City Railway Co.*, 395 U.S. 164, 89 S. Ct. 1706, 23 L. Ed. 2d 176 (1969).

Santa Fe, in its original brief filed herein as an appellant, makes this dogmatic statement with reference to ICC regu-

[1] The jury had already found that the safety valves on the car were "safety appliances" under the definition used in No. 7, but did not find that the safety valves "failed to perform properly." (Special Issues Nos. 4 and 5)

lations existing at the time of the accident, saying that such

> "* * * are found in the Code of Federal Regulations, Title 49, Transportation, Part 231, Railroad Safety Appliance Standards. Sections 231.7 to 231.9 and 231.21 of these Regulations deal specifically with tank cars of various types. These sections make specific provision for the number of hand brakes, the dimensions, locations and the manner of application of sill steps, side handholds, end handholds, tank head handholds, safety railings, operating platform ladder and safety railings, the specifications for uncoupling levers and end ladder clearances.
>
> "*The Interstate Commerce Commission and Transportation Department Regulations have never mentioned or referred to the dome lid cover of tank cars.*
>
> "During the course of trial, the Plaintiffs did not offer any evidence of or make any suggestion that there was in existence approved or required specifications for tank car dome lid covers promulgated by governmental authority, trade association, or any other body the standards of which had been violated by the tank dome lid or cover on car UTLX 48028." (Emphasis supplied)*

Plaintiffs have not challenged the statement contained in Santa Fe's brief and we accept the same as true (see fn. 8, supra). *Rule 419, T.R.C.P.* The fact that ICC has not mentioned dome lid covers in its regulations does not, however, conclusively establish as a matter of law that such

*Similar statements found in the briefs of Union Tank (at p. 61) and Hercules (at p. 30) are not challenged by plaintiffs. The first line of the "statement of facts" found in plaintiffs' brief reads: "Any statement of the facts of this case by any defendant which is inconsistent with the following is not admitted, agreed to, or accepted by plaintiffs." With four sets of briefs to be considered, some containing hundreds of pages, we do not consider this caveat of plaintiffs to be acceptable within the spirit and meaning of *Rule 419*. Such a construction would render meaningless *Rule 419* and thrust a burden upon the court which properly should be assumed by the appellees, plaintiffs below. Nevertheless, we have carefully considered the voluminous record and find that the statements of the defendants so noted are true to the record.

instrumentalities are not safety appliances within the reach of the Act. *Shields*, supra (350 U.S. at p. 321).

We have mentioned that plaintiffs rely upon the jury finding, as a fact, that the dome lid was a safety appliance. Each of the defendants contends that whether or not the dome lid is an appliance within the meaning of the Act is a question of law for determination by the court, not the jury. Thus, in our consideration of this question, we reach the heart of the problem presented by this case.

While the Supreme Court of the United States reversed the lower court in *Shields*, supra, it did so because it considered that the dome running board involved therein was a safety appliance within the meaning of the Act. In did not repudiate or overrule the lower court's holding that such determination was one of law, not of fact. In words pregnant with good judgment and sound law and particularly apropos to the contentions of the plaintiffs, Judge Hutcheson in *Atlantic Coast Line Railroad Co. v. Shields*, 220 F. 2d 242, 245 (5th Cir., 1955), reversed on other grounds, 350 U.S. 318, 76 S. Ct. 386, 100 L. Ed. 364 (1955) said:

> "He [the trial court] did correctly declare in his charge: that whether it was or was not a safety appliance was to be determined as matter of law; and that he did not and would not consider the testimony of any of the witnesses as to whether it was or was not.
>
> * * *
>
> "As appellant correctly points out in the discussion in its brief, a chaotic condition would be produced if the question of compliance with the Safety Appliance Act and the specifications governing the number, location, dimension and manner of appliances should be left to the varying notions of judges or the inexperienced laymen who comprise petit juries. For it is not every device with which a car might be equipped which comes under, and is governed by, the Safety Appliance Act or the regulations adopted by the Interstate Commerce Commission pursuant thereto. Only those are

> safety appliances which are officially determined by law or regulation to be such. [citations omitted]"

Justice Anderson, although not citing Judge Hutcheson's remarks, came to the same conclusion in *Thomas*, supra (305 S.W. 2d at p. 645):

> "* * * as we understand the record, the trial judge concluded that, *as a matter of law*, the board that gave way with appellant was not a grab iron or handhold within the scope of the above-quoted provision of the Safety Appliance Acts.
>
> "* * * we have concluded that within contemplation of the Safety Appliance Acts the board that gave way with appellant was, *as a matter of law*, a handhold which appellee was required to have secure." (Emphasis supplied)

Other than for general language from a host of cases speaking of the liberality of construction of the Act, plaintiffs rely upon *Shields* and *Thomas* to support their recovery. We say, as was said in *Mazzucola v. Pennsylvania Railroad Co.*, 281 F. 2d 267, 268 (3rd Cir., 1960): "Plaintiff's claim for protection under the Federal Safety Appliance Act is an ingenious as it is unsound."[9]

In *Shields*, Justice Minton noted that § 2 of the Act required that "'* * * all cars requiring secure ladders and secure running boards shall be equipped with such ladders and running boards * * *'" He then noted that ICC had promulgated regulations pertaining to "running boards" on tank cars (350 U.S. at p. 320). He then commented upon the fact that "the dome running board has major importance in loading and unloading operations" (p. 321), was also

[9] The caterpillar tractor Mazzucola was using to move cars was not equipped with an automatic coupling device, although such devices were on the cars being moved. His argument was that the tractor was a "locomotive" because of the use to which it was then being put. Judge Goodrich says: "According to this line of argument, a team of mules hitched to a car to move it would be a 'locomotive' and so would a block and tackle device operated by human power exerted for the same purpose."

used by railroad men in passing signals, etc., and that the railroad men using such cars often "refer to the dome running board as a running board." (Id.) So finding support in the Act, in ICC regulations, and *use* of the device as a "running board", he came to the crux of the decision saying: "We hold that it [the dome running board] comes within the meaning of the term 'running boards' as used in § 2." (Id.) No one can or does fault that determination. Mr. Justice Minton found simply that his particular type of board was a "running board" as defined in the Act.

Plaintiffs here lack any supporting language in the Act, ICC regulations or use. The hard and stubborn fact remains — dome lid covers are not mentioned in the Act, regulations, or otherwise. Congress has not spoken, ICC has taken no action, and no court has ever attempted to classify dome lid covers as safety appliances under the Act. We are of the opinion that the question of whether an instrumentality is an "appliance" within the meaning of the Act is a question of law for determination by the court, not a question of fact for a jury. Further, our review of the authorities leads us to the conclusion that no instrumentality is a "safety appliance" within the meaning of the Act unless it is specifically mentioned in the Act or the regulations of ICC, or is used as a substitute for something which is so mentioned or used. Neither *Shields* nor the Act authorized a jury of laymen to determine that the dome lid was a safety appliance under the Act.

Nor do plaintiffs fare any better when we come to consider this court's decision in *Thomas*, supra. The defective board which split and partially gave way was actually being used by Thomas as a handhold. Rather than being "secure", it broke, casting him to the ground causing his injuries. Justice Anderson, speaking for this court, held that the defective board was, in law and in fact, a handhold, saying:

> "The board's position rendered it inevitable that frequently, if not invariably, it would be grasped by any one entering or leaving the car by way of the ladder or seeking or departing a position atop the wall of the

> car or standing high on the ladder or passing from the ladder to its counterpart on the end of the car. * * * The conclusion is inescapable, therefore, *that the board that gave way with appellant was both designed and intended as a handhold, and as a practical matter was a handhold*, even though considerations other than the installation of a handhold accounted for its being on the car in the first instance." (305 S.W. 2d at p. 645, emphasis supplied)

As he had pointed out on the previous page, "grab irons and handholds" were specifically mentioned in § 4 of the Act and were required to be secure. Plaintiffs can point to no such statutory basis when they speak of the dome lid as a pressure venting device.

Plaintiffs also cite *Southland Paper Mills, Inc. v. Rhoads*, 434 S.W. 2d 730 (Tex. Civ. App. — Beaumont, 1968, no writ), as supporting their position. This was an interlocutory appeal involving venue and the judgment of the trial court found support in the record upon grounds other than the applicability of the Act. Nevertheless, we have reviewed the opinion in *Rhoads* but find no basis for its use in this case.

Calling attention to the fact that the regulations of ICC required that the dome be "surrounded by a safety rail and a platform"; and it being admitted that the car in question had no such railing, the court in *Rhoads* simply held that Act was applicable. (434 S.W. 2d at p. 732) We have no parallel situation present in this case. Particularly, we have no ICC regulation touching in any manner the use of a dome lid as a venting mechanism. *Rhoads* fails to support plaintiffs' position because of this distinction, one going to the heart of the controversy.

We have carefully considered all of the authorities cited by the plaintiffs[10] in support of their contention that the

[10] In addition to the cases discussed previously, plaintiffs cite and rely upon the following cases, all of which have been examined and studied carefully: *Coray v. Southern Pacific Co.*, 335 U.S. 520, 69 S. Ct. 275, 93 L.Ed 208 (1948) [defective air brakes on train];

(Footnotes continued on following page)

dome lid was a safety appliance within the meaning of the Act and find no support for such position. It follows, therefore, that we are of the opinion that the trial court erred in overruling the several appropriate motions of the several defendants challenging such holding. Consequently, we sustain the following points in the respective briefs of the appellants: Hercules' points 1, 2, 3, 4, 7, 8 and 10; Santa Fe's points 1, 2 and 4; Union Tanks' points 3, 4, 8, 9 and 23. Conversely, after considering plaintiffs' counter-points one through four, we find no merit therein.

The judgment of the trial court can find support only in the findings that the dome lid was a safety appliance within the Act since no issue of negligence was submitted in connection with the issues submitting such question. Each of the several defendants objected to the submission of Special Issue No. 8, and to the series as a whole, for the reason that no issue on negligence was submitted. On the other hand, plaintiffs have consistently taken the position that the series was one under the Act and that liability was absolute without the necessity of a finding of negligence. We recognize the rule that in a proper case involving a safety appliance, liability is absolute and plaintiff need not procure a finding of negligence. *Shields*, supra.

But, we have held that this series of issues does not establish liability under the Act; consequently, if plaintiffs

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(Footnotes continued from preceding page)

O'Donnell v. Elgin, Joliet & Eastern Railway Company, 338 U.S. 384, 70 S. Ct. 200, 94 L. Ed. 187 (1949) [defective coupler]; *Affolder v. New York, Chicago & St. Louis Railroad Company*, 339 U.S. 96, 70 S.Ct. 509, 94 L.Ed. 683 (1949) [defective coupler]; *Fairport, Painesville & Eastern Railroad Co. v. Meredith*, 292 U.S. 589, 54 S.Ct. 826, 78 L.Ed. 1446 (1933) [no air brake connection between locomotive and cars — non-employee injured in grade crossing accident]; *Brady v. Terminal Railroad Association of St. Louis*, supra, [insecure grab iron caused injury to employee of another railroad]; *Colorado Milling & Elevator Company v. Terminal Railroad Ass'n.*, 350 F. 2d 273 (8th Cir, 1965) [defective brake]; *Rodgers v. Conemaugh & Black Lick Railroad Company*, 137 F. Supp. 467 (D.C., W.D., Pa., 1956) ["loose and flapping" sill step and grab iron]; *Monongahela Railway Company v. Black*, 235 F. 2d 406 (4th Cir., 1956) [defective brakes]; *Barney v. Staten Island Rapid Transit Railway Company*, 316 F. 2d 38 (3rd Cir., 1962) [consignee's employee injured on insecure ladder on car].

were to obtain any benefit from such series, they should have included a finding of negligence. *Petroleum Anchor Equipment Co., Inc. v. Tyra*, 419 S.W. 2d 829, 834 (Tex. Sup., 1967); *Luther Transfer & Storage, Inc. v. Walton*, 156 Tex. 492, 296 S.W. 2d 750, 755 (1956). No such issue was included and no finding of negligence can now be presumed. Thus, plaintiffs gain nothing by this series of issues, either under the Act or under the common law.

Our review has disposed of every issue of liability as against Santa Fe; but, as to Hercules and Union Tank, there remains for consideration the legal effect, if any, of the answers to Special Issues Nos. 10, 11 and 12 (as to Union Tank) and identical issues Nos. 13, 14 and 15 (as to Hercules), all of which were answered affirmatively. Similar issues submitted as to Santa Fe were answered favorably to Santa Fe and adversely to plaintiffs. We now quote the series applicable to Union Tank:

> *No. 10:* "* * * Union Tank Car Company supplied tank car No. UTLX 48028 with a dome lid which said defendant expected to serve and be used as an appliance necessary for the purpose of releasing the internal pressure, if any, of said tank car at the time and on the occasion in question?"
>
> *No. 11*, conditioned upon an affirmative answer to No. 10: "* * * the dome lid failed to release the internal pressure, if any, of tank car No. UTLX 48028 as expected, if it was, by defendant Union Tank Car Company?"
>
> *No. 12*, conditioned upon an affirmative answer to No. 11: "* * * such failure of the dome lid to release the internal pressure, if you have so found, was a proximate cause of the fatal injury to Glenn Patrick and the personal injuries to Earl Eilers?"

Attention is called to the fact that again there is no negligence issue included within this cluster nor is there any amplification of the key words used in No. 10: "* * * which

said defendant expected to serve and be used as an appliance * * * "

Before turning to a consideration of the several massive assaults made upon the series of issues just mentioned, we mention some of the other *non-findings* of the jury, so as to bring into proper apposition these particular issues just quoted. *Plaintiffs failed to convince the jury* (i.e., did not procure affirmative answers to every necessary issue in each series) *that any of the following facts existed:*

(a) That the safety valves failed to perform properly [No. 4];

(b) That one of the safety valves was defective [No. 19];

(c) That the corroded condition of the dome on the car rendered it defective for its intended use [No. 22];

(d) That the maintenance of safety valves on the car which allowed internal pressure to build up to 25 psi before activating the valves rendered the car unsafe for its intended use [No. 29];

(e) That when the dome lid did not release the pressure because it was stuck and the safety valves would not release the internal pressure until it reached 25 psi, the tank car was negligently maintained [No. 33];

(f) That the defendants failed to inspect the safety valves on the car as reasonably prudent inspectors would have done [No. 35];

(g) That the defendants failed to inspect the dome lid, as reasonably prudent inspectors would have done, before moving the car into the premises of EasTex [No. 39];

(h) That Union Tank failed to properly repair the safety valves [No. 43];

(i) That before delivery of the car by Santa Fe, all closures of openings on the tank car were not properly secured in place [No. 46];

(j) That each defendant was negligent in failing to warn Eilers and Patrick of the defective tank car [No. 50];

(k) That the safety valves on the car were defective at the time such car was delivered to EasTex [No. 85].

On the other hand, the jury found, *affirmatively*, these defensive issues:

(a) That the *dome cover* on the car was reasonably suited for the purpose for which it was intended at the time of the delivery of the car to EasTex [No. 88];

(b) That the *car* was reasonably suited for the purpose for which it was intended at the time of the delivery to EasTex [No. 88-A];

(c) That the car was inspected by Santa Fe employees at four different times before delivery of the car to EasTex [Nos. 94, 95, 96, and 97];

(d) The inspection was visual and made from the ground [No. 98] and did not reveal the hidden defect which caused the dome lid to be blown off [No. 99].

When we return to a consideration of the issues remaining — as to what Union Tank and Hercules might have "expected" of the dome lid as a pressure releasing device — one legal conclusion is inevitable: no issue in either series constitutes a finding of a violation of the Safety Appliance Act. Secondly, there being no finding of common law negligence, liability cannot be predicated upon that doctrine. Finally, the factual basis for the findings are attacked under the appropriate no-evidence points.[11] In our consideration of this

[11] Additionally, Hercules contends that the issues lack support in the pleadings of the plaintiffs. While the contention appears to

(Footnote continued on following page)

point, we do so under the rule announced in *Renfro Drug Co. v. Lewis*, 149 Tex. 507, 235 S.W. 2d 609, 613 (1950), considering only the evidence most favorable to the finding and disregarding that which is opposed to it.

Plaintiffs attempt to find support in the evidence for the findings of the jury to the issues under discussion by pointing to the answers to the interrogatories served upon Union Tank and Hercules.[12] The answer to the interrogatory became evidence in the case when offered by the interrogators (plaintiffs) as an admission against interest on the part of the party interrogated (Union Tank). *Rule 168, T.R.C.P.* See also, *Heilig v. Studebaker Corporation*, 347 F. 2d 686, 689 (10th Cir., 1965), construing the comparable Federal Rule of Civil Procedure, *Rule 33, F.R.C.P.* And, we are willing to accept plaintiffs' further argument that Hercules, because of the manner in which it answered the identical in-

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(Footnote continued from preceding page)

have merit, we do not turn the case on this point. *Gulf, Colorado & Santa Fe Railway Co. v. Bliss*, 368 S.W. 2d 594, 599 (Tex. Sup., 1963); *Hammer v. Dallas Transit Company*, 400 S.W. 2d 885, 889 (Tex. Sup., 1966).

[12] Interrogatory No. 19, subdivisions (a) and (b), propounded to Union Tank, are quoted:

> "*(a)* State in detail the manner in which the dome lid or cover which was installed on tank car no. UTLX 48028 is opened, *(b)* the sequence of steps involved in opening said dome lid or cover." *Answer:* "Manner in which the dome lid or cover is opened and/or the sequence of steps involved in opening said dome lid or cover are: 1. Remove seal from seal bolt. 2. Loosen all nuts a little at a time until all internal pressure (if any) has been relieved. 3. Unscrew all nuts up to retaining nuts and throw back all eye bolts except hinge bolt marked (H) and the seal bolt marked (S). 4. Lift cover on seal bolt side which will allow hinge bolt to be thrown back. Cover can then be removed. [Reference is made to Drawing No. 55357, dated August 16, 1937.]" (The drawing mentioned is likewise in evidence and it contains a "note" giving similar instructions for the opening of the dome, referring to particular sketches on the drawing.)
>
> Hercules, asked the same question, contented itself by answering that the car was equipped with safety valves designed to release at 25 pounds pressure per square inch, and suggested that other information sought in the interrogatory be obtained from Union Tank.

terrogatory submitted to it, may have bound itself to the answer given by Union Tank.

So conceding, however, we do not reach the end sought by the plaintiffs, evidentiary support for the answers to special issues under discussion. Obviously, the interrogatory sought information as to the manner of opening the tank car preparatory to commencement of loading or unloading operations. If pressure had built up in the tank car during transit, the procedure out-lined in the answer was designed to assure a safe release thereof; but, we decline to attribute to the answer the effect the plaintiffs now urge. Indeed, it would be equally consistent to use the answer as uncontradicted evidence that plaintiffs failed to use reasonable care in releasing the pressure. For, if the lid had been bolted in place, it could not have blown off while the internal pressure in the car was being released.

Thus, our review of the evidence does not disclose *any* support for the finding as to what, if anything, either Union Tank or Hercules "expected" of the dome lid cover as a pressure release mechanism. Neither Hercules nor Union Tank offered any witnesses on the subject nor did plaintiffs offer any evidence as to what either of the two defendants might have "expected" under the circumstances. There is evidence, however, offered by Hercules and Union Tank through cross-examination of plaintiffs' witnesses, that proper procedure in bottom-loading tank cars required the removal of the lid during the operation. But, when we consider the other side of the coin, we find no evidence in the record supporting or tending to support the finding that either Hercules or Union Tank "expected" the dome lid to be used as an auxilliary safety vent. Plaintiffs have, therefore, failed to bring forward the necessary proof to support the issue. Having carefully studied the more than seven hundred page statement of facts, we are unable to find even a "glimmer of evidence" supporting the issues. *Seideneck v. Cal Bayreuther Associates*, 451 S.W. 2d 752, 755 (Tex. Sup., 1970).

More important, however, is the fact that the series of issues did not fix liability under the Safety Appliance Act for the reasons set forth in our prior discussion of the preceding series of issues, Nos. 7, 8, and 9 (supra, pp. 17-20). Absolute liability for the violation of the provisions of the Safety Appliance Act can be imposed only because a carrier has not complied with the provisions of this Act of Congress. Liability may not be imposed because some part of a car, not mentioned in either the Act or the regulations, fails to come up to the undisclosed expectations of the owner, lessee, or the carrier temporarily in possession thereof.

Nor can plaintiffs use the series as supporting a common-law finding of liability because there was no negligence issue submitted and the several defendants pointed out such omission in their objections to the charge. *Petroleum Anchor Equipment Co., Inc. v. Tyra*, supra (419 S.W. 2d at p. 834).

The points of Union Tank and Hercules assailing the respective issues (Nos. 10, 11, and 12 as to Union Tank and Nos. 13, 14, and 15 as to Hercules) are sustained. It was error for the trial court to enter judgment predicated in any manner upon the findings of the jury in response to these issues.

When we examine the judgment, in the light of the answers of the jury to the remaining questions, we find that there is no other possible basis for liability asserted by the plaintiffs. Each defendant was acquitted of any act of common-law negligence proximately causing the injury to Eilers and the death of Patrick. Thus, the remaining points of the several defendants, and there are many, become immaterial in the disposition of the case. There being no liability as a matter of law upon the part of any of defendants under the Act, and there being no liability under the common law as a matter of fact, the trial court erred in rendering judgment against the defendants, or either of them.

The judgment of the trial court is here and now REVERSED and Judgment RENDERED for each of the appellants.

All costs in all courts are assessed against plaintiffs and Intervenor, jointly and severally.

.....

Quentin Keith
Associate Justice

Opinion delivered September 10, 1970

APPENDIX D

In the

SUPREME COURT OF TEXAS

From Jasper County, Ninth District.

January 13, 1971.

No. B-2402

EARL EILERS et al.

v.

HERCULES, INC. et al.

Application of petitioners for writ of error to the Court of Civil Appeals for the Ninth Supreme Judicial District having been duly considered, and the Court having determined that the application presents no error requiring reversal of the judgment of the Court of Civil Appeals, it is ordered that said application be, and hereby is, refused.

It is further ordered that applicants, Earl Eilers et al.,

pay all costs incurred on this application.

D-2

No. B-2402

From Jasper County, Ninth District.

February 10, 1971.

EARL EILERS et al.

v.

HERCULES, INC. et al.

Petitioners' motion for rehearing of application for writ of error having been duly considered, it is ordered that said motion be, and hereby is, overruled.

I, GARSON R. JACKSON, Clerk of the Supreme Court of Texas, do hereby certify that the above and foregoing is a true and correct copy of the orders of the Supreme Court of Texas in the case numbered and styled as above, as the same appears of record in the minutes of said Court under the dates shown.

WITNESS my hand and the seal of the Supreme Court of Texas, at the City of Austin, this, the 12th day of February, 1971.

GARSON R. JACKSON, Clerk

By L. R. Adkins, Deputy.

L. R. Adkins

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1970

No. 1620

EARL EILERS, ET AL,

Petitioners,

v.

HERCULES, INC., ET AL,

Respondents.

ON PETITION FOR CERTIORARI

BRIEF OF RESPONDENT THE ATCHISON, TOPEKA AND SANTA FE RAILWAY COMPANY, IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

A Respondent, Santa Fe, respectfully submits that for the reasons herein set forth, the Petition for Certiorari should be denied.

QUESTION FOR REVIEW

Whether a railway tank car dome cover is a required Federal safety appliance under the Federal Safety Appliance Acts (quoted Appendix A pps. A1-8, Petition for Certiorari).

Petitioners contend it was.

The Texas Appellate Courts decided it was not.

1.

There is no conflict with applicable decisions of this Court. In the main, Petitioners contend that the Appellate Courts of Texas are in conflict with the Shields case by this Court.

In *Shields v. Atlantic Coast Line R. Co.*, 380 U.S. 318 (1956), this Court held that a dome platform came within the meaning of the term "running boards" as used in the Safety Appliance Acts and was required to be "secure" because the dome platform served the same purpose and was used in the same manner as a "running board" and was frequently referred to by experienced railroad men as a "running board."

This Court imposed liability because the dome platform did not meet the standard prescribed by the Safety Appliance Acts §2, requiring all cars to be equipped with "secure running boards." The carrier was held guilty of negligence as a matter of law. The contractor of the consignee engaged in unloading the tank car, injured when the dome platform collapsed, was held to be within the class of persons afforded protection by the Acts as the obvious purpose of the dome running board was to provide a secure flooring for those engaged in operations in connection with the loading and unloading of the tank car.

The determination made in Shields case was that the dome running board or platform was a safety appliance as a matter of law.

The Texas Supreme Court refused writ of error to review the Court of Civil Appeals' holding in this case

that as a matter of law the dome lid cover on a tank car was not a safety appliance within the meaning of the Acts because it was not mentioned in the Acts and no standard was prescribed in the Acts to be met by a dome cover. The Court of Civil Appeals in its opinion clearly and correctly distinguishes between the Shields case and this cause.

The basic determination upon which all courts involved in the problem have agreed, is that the question of whether a particular item is a safety appliance under the Federal Acts is one of law for determination by the court as opposed to fact.

On this score the judgment and decision of the Texas Court of Civil Appeals and the Supreme Court of Texas are strictly in accord with the applicable decisions of this Court.

2.

The decision of the Texas Court of Civil Appeals and the Texas Supreme Court are correct.

The trial court jury did not find any act or omission by Respondent Santa Fe to be negligent (Tr., Vol. III, pps. 552-592).

The only possible basis for imposition of liability on Santa Fe was the asserted violation of the Federal Safety Appliance Acts. On close inspection the jury verdict does not support this basis. The trial jury did not find a violation of the Federal Safety Appliance Acts. The answers of the jury to the questions put to them failed to connect the "safety appliance" which they found in the dome lid cover to the Federal Acts in any way. The jury did not

find the dome lid cover of the tank car to be a safety appliance under the Federal Acts, but found only that it was a "safety appliance" as defined in the accompanying instructions. This instruction did not mention or refer in any manner to the Federal Safety Appliance Acts. In *Shields* the Court placed emphasis on the obvious purpose of a dome running board to provide a secure flooring for those who must perform operations in connection with the tank car. By contrast, the obvious purpose of the dome lid is to contain the contents while in transit and give access to the interior of the car at destination. It does not serve a purpose similar to that of any of the items of equipment designated in the Safety Appliance Acts. It was not designed or intended to act as a safety valve. The car involved here was equipped with safety valves and the trial court jury refused to find that they were deficient in any of the several ways suggested in the issues put to them (Tr. Vol. III, pps. 560-62).

Dome lid covers for tank cars are not mentioned in the Safety Appliance Acts. Neither the Acts nor the regulations under them set forth any standards that are to be met by dome covers.

The dome covers are not similar to or within the general category of any of the equipment designated in the Acts; it is not used and is not capable of serving as a substitute for any such equipment; it has no function in respect of train or car movement.

Here as in case of *Mazzucola v. Pennsylvania Ry. Co.*, 281 F.2d 267 (Third Cir. 1960), "Plaintiff's claim for protection under the Federal Safety Appliance Acts is as ingenious as it is unsound."

CONCLUSION

It is respectfully submitted that no sound reason exists for grant of certiorari in this case, and that the Petition should be denied.

Respectfully submitted,

O'BRIEN & RICHARDS
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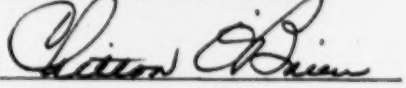
By 
CHILTON O'BRIEN

Attorneys for Respondent,
The Atchison, Topeka and
Santa Fe Railway Company

Certificate of Service

I hereby certify that I am a member of the United States Supreme Court bar and one of the counsel of record for the Respondent, The Atchison, Topeka and Santa Fe Railway Company herein and that on the 19th day of May, 1971, three (3) copies of the above and foregoing Brief of Respondent, The Atchison, Topeka and Santa Fe Railway Company, in Opposition to Petition for Writ of Certiorari were served on each party represented herein, pursuant to United States Supreme Court Rule 33, Paragraph 1, by depositing same in the United States post office, Beaumont, Texas, with first class postage prepaid, and properly addressed to their respective counsel of record at the post office address of each, to wit:

Petitioners, Earl Eilers & Peggy Patrick, et al, to their counsel of record:
Gilbert I. Low, Beaumont Savings Building, Beaumont, Texas, 77701; Joe H. Tonahill, March H. Coffield, Tonahill Building, Jasper, Texas, 75951.

Respondent, Hercules, Inc., to its counsel of record: Mr. Richard B. Miller, Baker, Botts, Shepherd & Coates, 1 Shell Plaza, Houston, Texas, 77001.

Respondent, Union Tank Car Company, to its counsel of record: Mr. George A. Weller, Weller, Wheelus, Green & Brocato, Beaumont Savings Building, Beaumont, Texas, 77701.

Chilton O'Brien

CHILTON O'BRIEN